No. 13685

United States Court of Appeals for the Ninth Circuit.

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska First Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

For Appellant:

STUMP & BAILEY,
Box 2014,
Ketchikan, Alaska.

FERGUSON & BURDELL,
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Seattle 1, Washington.

For Appellee:

P. J. GILMORE, JR.,
United States Attorney,
Juneau, Alaska.

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. F. SCHAUB,

Defendant.

COMPLAINT

The United States of America, by P. J. Gilmore, Jr., United States Attorney for the First Judicial Division, Territory of Alaska, acting under the direction of the Attorney General of the United States and at the request of the Secretary of Agriculture, for its complaint alleges as follows:

I.

This is a civil action brought by the United States, and accordingly, the judisdiction of this Court is invoked under 28 U.S.C.A. 1345.

II.

The defendant, H. F. Schaub, at all times herein mentioned resided in and has his principal place of business at Ketchikan, Alaska.

III.

The plaintiff is the owner of a tract of land comprising 37.5 acres, more or less, situated in and being a part of the Tongass National Forest, Revil-

lagigedo Island, Alaska, located on and near Whipple Creek, about 11.5 miles north of the City of Ketchikan, and more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

IV.

The 37.5 acres of land described in paragraph III were and now are a part of 91.13 acres of land, more or less, set apart and appropriated by the Regional Forester of the United States Forest Service, Department of Agriculture, Juneau, Alaska, September 3, 1940, as a public service site pursuant to the provisions of Order of Secretary of Agriculture of Feb. 1, 1926, and Regulations, Nat'l Forest Service Manual, pp. 57-L and 61-L.

V.

The 37.5 acres of land described in paragraph III were on February 9, 1951, set apart, appropriated and reserved for the use of the Bureau of

Public Roads, Department of Commerce, as a source of road building material by the Regional Forester, U. S. Forest Service, Department of Agriculture, Juneau, Alaska.

VI.

The Secretary of Interior by Public Land Order No. 734, dated July 20, 1951, and published July 26, 1951, in 16 Federal Register 7329, withdrew the 37.5 acres of land described in paragraph III from all forms of appropriation under the public land laws, including the mining laws, and reserved for the use of and administration by the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, as the Whipple Creek Public Service Site.

VII.

Beginning with the approximate date of June 1, 1934, and continuing up to about August 22, 1951, plaintiff, acting by and through the United States Forest Service, Department of Agriculture, and Bureau of Public Roads, Department of Commerce, its officers, servants, agents and employees, in the execution of the laws of the United States and regulations thereof, appropriated for the use and occupancy by the United States Forest Service and Bureau of Public Roads the 37.5 acres of land described in paragraph III, by prospecting, searching for, surveying, finding and discovering sand, gravel and stone in and on the said land; and during said period, particularly, but not limited to the calendar years of 1934, 1942, 1948, 1949, 1950 and 1951, used

and occupied said land, mined and removed and authorized under contract the mining and removal from the said 37.5 acres of land, of large quantities of sand, gravel and stone in the building, construction, repair and maintenance of roads, highways and other government works.

VIII.

Defendant unlawfully claims a right, title and interest in and to the 37.5 acres of land described in paragraph III, and on or about June 21, 1951, unlawfully and without any right went upon said land and posted a notice of a claim of right, title and interest in and to the said 37.5 acres of land; and on or about August 22, 1951, defendant unlawfully and without any right erected barricades across and upon the right-of-way built and constructed by plaintiff for ingress and egress to, upon and from said 37.5 acres of land; and on divers other days between that day and the beginning of this action, the defendant, his servants, agents and employees unlawfully moved a trailer house upon said 37.5 acres of land, and removed timber and overburden, mined and removed sand, gravel and stone, and are engaging in removing timber and overburden, mining and removing sand, gravel and stone from within the boundaries of the said 37.5 acres of land; and is threatening to mine, remove, carry away and convert to his own use sand, gravel and stone from the 37.5 acres of land, all to the great damage of the plaintiff.

IX.

Defendant, his servants, agents and employees have since on or about August 22, 1951, unlawfully prevented plaintiff from the free use of the only means of ingress and egress to, upon and from the said 37.5 acres of land or portion thereof described in paragraph III, and have prevented plaintiff from using and occupying said land, and mining and removing sand, gravel and stone from the 37.5 acres of land, all to the great damage of the plaintiff.

X.

The actions of the defendant, his servants, agents and employees, by barricading the right-of-way to the said 37.5 acres of land described in paragraph III; by placing a trailer house upon said 37.5 acres of land; by removing timber and overburden, mining and removing sand, gravel and stone from said 37.5 acres of land; by preventing plaintiff, its officers, servants, agents, employees and contractors from the free ingress and egress to, upon and from said 37.5 acres of land; by preventing plaintiff, its officers, agents, employees and contractors from using and occupying said land, mining and removing sand, gravel and stone from said 37.5 acres of land; and threatening to continue to so barricade said right-of-way, leave the trailer house on said land, to remove timber and overburden, mine and remove sand, gravel and stone from said land; to prevent plaintiff, its officers, servants, agents, employees and contractors from the free ingress and egress to, upon and from said land, using and oc-

cupying said land, and mining and removing sand, gravel and stone from said land in violation of the rights of plaintiff, constitutes a serious interference with the United States and its administration of the Tongass National Forest, and its administration of the Tongass National Forest, and administration of the Bureau of Public Roads, its use and occupancy of lands appropriated and reserved for governmental use and in carrying out its obligations to the public in the building, constructing, repair and maintenance of roads, highways and other governmental works.

XI.

Plaintiff has entered into a valid contract with Manson-Osberg Company, a corporation, for the construction, improvement, repair and maintenance of the North Tongass Highway, Revillagigedo Island, Alaska. The contract provides that Manson-Osberg Company may obtain, borrow material from the 37.5 acres of land described in paragraph III, and by reason of defendants unlawful and wrongful acts complained of herein, plaintiff, its officers, servants, agents, employees and contractors have been and are being prevented from constructing, improving, repairing and maintaining said highway, all to the great damage to plaintiff.

XII.

That while this action is pending, the defendant intends to and will,, unless enjoined, continue to barricade plaintiffs right-of-way to said 37.5 acres of land described in paragraph III; leave a trailer

house on said land, remove timber and overburden, mine and remove sand, gravel and stone from said land; interfere with and prevent plaintiff from free ingress and egress to, upon and from said land; prevent plaintiff from using and occupying said land; and prevent plaintiff from mining and removing sand, gravel and stone from said land, all in violation of the rights of the United States, and an injunction is necessary to restrain the defendant from committing the acts aforesaid.

Wherefore, the plaintiff prays:

1. That this Court issue a temporary injunction restraining the defendant, his servants, agents and employees until further order of this Court, from: Barricading plaintiffs' right-of-way to, on and from the said 37.5 acres of land described in paragraph III; using and occupying said land; mining and removing sand, gravel and stone from said land; interfering with plaintiff, its departments, agencies, officers, servants, agents, employees and contractors in using and occupying said land, and mining and removing sand, gravel and stone from said land;

2. That defendant be required to remove from the said 37.5 acres of land the trailer house and any and all other property and equipment belonging to defendant;

3. That defendant be required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of land and the right-of-way to, on and from said land;

4. That defendants claim of right, title and interest be declared invalid, insofar as his claim of right, title and interest embraces or constitutes a part of the said 37.5 acres of land;

5. That upon full hearing a permanent injunction be issued;

6. That the damages suffered by plaintiff by reason of the unlawful acts of the defendant herein complaint of be ascertained and that judgment be entered in favor of the plaintiff and against the defendant for the amount of such damages;

7. That the plaintiff recover its costs and attorney fees herein;

8. For such further relief as may be just.

/s/ P. J. GILMORE, JR.,
United States Attorney,
Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

I, P. J. Gilmore, Jr., being first duly sworn, on oath, depose and say:

That the United States Government is the plaintiff in the foregoing complaint, that I have read the said complaint and know the contents thereof, and that the facts stated therein are true and correct, as I verily believe.

/s/ P. J. GILMORE, JR.

Subscribed and sworn to before me this 3rd day of October, 1951.

[Seal] /s/ A. V. SIMONSEN,
Deputy Clerk of the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

I, Wilfred Stump, am the attorney for H. F. Schaub, and am authorized to, and hereby accept and acknowledge service on behalf of H. F. Schaub, defendant herein, this 3rd day of October, 1951.

/s/ WILFRED C. STUMP,
Attorney for Defendant.

(True Copy)

Correction Memorandum No. 11
Whipple Creek Group
Section 4, North Tongass Highway

1. The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building material:

Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence N. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence

S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 + 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

Correction Memorandum No. 11 Approved.

Date: Feb. 9, 1951.

In evidence.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester.

[Title of District Court and Cause.]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause coming on to be heard on the motion of plaintiff for a preliminary injunction and due notice having been given to the defendant and the Court having considered the statements of counsel and being fully advised in the premises, it finds:

That the defendant claims a right, title and interest in and to the 37.5 acres of land described in Paragraph 3 of the complaint filed in the above-entitled cause and that on or about June 21, 1951, the defendant went upon said land and posted a notice of a claim of right, title and interest in and to the said 37.5 acres of land under a mineral entry; and on or about August 22, 1951, the defendant

erected barricades across and upon the right-of-way built and constructed by plaintiff for ingress and egress to, upon and from said 37.5 acres of land; and on divers other days between that day and the beginning of this action, the defendant, his servants, agents and employees moved a trailer house upon said 37.5 acres of land, and removed timber and overburden, mining and removing sand, gravel and stone and are engaging in removing timber and overburden, mining and removing sand, gravel and stone from within the boundaries of the said 37.5 acres of land; and is threatening to mine, remove, carry away and convert to his own use sand, gravel and stone from the said 37.5 acres of land and that defendant, his servants, agents and employees have since on or about August 22, 1951, prevented plaintiff from the free ingress and egress to, upon and from the said 37.5 acres of land herein above mentioned and have prevented plaintiff from using and occupying said land and mining and removing sand, gravel and stone from the said 37.5 acres of land, all to the great damage of the plaintiff.

It Is Ordered, Adjudged and Decreed that pending further order of this Court H. F. Schaub, his servants, agents, representatives, employees and successors, and all other persons in active concert and participation with them, be and they hereby are restrained and enjoined from:

1. Barricading plaintiffs' right-of-way to, on and from the said 37.5 acres of land herein above

referred to and particularly described in Paragraph 3 of the Complaint filed in the above-entitled cause;

2. Using and occupying said land; mining and removing sand, gravel and stone from said land;

3. Interfering with the plaintiff, its departments, agencies, officers, servants, agents, employees and contractors in using and occupying said land, and mining and removing sand, gravel and stone from said land;

4. That defendant be required to remove from the said 37.5 acres of land the trailer house and all other property and equipment belonging to the defendant;

5. That the defendant be required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of land and the right-of-way to, on and from said land.

It Is Further Ordered, Adjudged and Decreed that this order should be effective from and after .... p.m., October 15, 1951.

Done in open Court this 15th day of October, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

Approved.

Two copies received this 15th day of October, 1951.

/s/ W. C. STUMP,
Attorney for Defendant.

[Endorsed]: Filed October 15, 1951.

[Title of District Court and Cause.]

MINUTE ORDERS

Monday, October 15, 1951

This matter came before the court for hearing on plaintiff's petition for the issuance of the Preliminary Injunction. Patrick J. Gilmore, Jr., United States Attorney, for plaintiff; W. C. Stump for defendant. Mr. Stump advised the court that he had stipulated with plaintiff that the preliminary injunction should issue and that they would get together and agree upon the terms of same and present the order later this day for the signature of the court. Counsel stated that they wanted this matter heard on its merits during this present term of court.

[Title of District Court and Cause.]

MINUTE ORDERS

Friday, December 14, 1951

Upon reading the written Motion of defendant, which was supported by an Affidavit of W. C. Stump, the Court signed an Order giving defendant until December 30, 1951, to file his Answer.

Friday, January 25, 1952

This case came before the court for trial without a jury. The Government was represented by Stanley D. Baskin, Assistant United States Attorney; W. C. Stump appeared for plaintiff and on his Motion, Donald McLellan Davidson was admitted as associ-

ate counsel for this case only. Plaintiff made an opening statement, following which this case was recessed till 2 o'clock p.m.

With all parties personally present, the trial of this case was resumed. Defendant made his opening statement to the Court. A certified copy of Forest Service Manual P-III was admitted in evidence as plaintiff's Exhibit # 1. A certified copy of the Forest Service Basic Regulations, etc., was admitted in evidence as Exhibit # 2. The Complaint was allowed to be amended and the amendment was made by the Court. Thereupon, C. M. Archbold was duly sworn and examined.

Saturday, January 26, 1952

With all parties personally present and with the witness, C. M. Archbold, on the stand, the trial of this case was resumed. Defendant moved to strike Paragraph 4 of the Complaint, which was denied after arguments. Thereafter C. F. Wyller was sworn and examined.

Monday, January 28, 1952

With all parties personally present, the trial of this case was resumed. Plaintiff called E. C. McCann, W. A. Chipperfield, Einar H. Hyberg and Hugh A. Stoddard who were sworn and examined, upon which plaintiff rested. Defendant moved to strike plaintiffs claim for damages, which was denied. Defendant also moved to strike plaintiff's case—on which Court reserved ruling. Thereupon defendant was sworn for testimony in his own behalf. A Notice of Location of Placer Claim for

"Whipple Creek No. 1" was admitted in evidence as Defendant's Exhibit A and thereupon defendant rested, upon which both sides rested. The Court requested counsel to file briefs and allowed plaintiff two weeks, defendant also two weeks for answering brief and plaintiff ten days for reply brief if necessary.

At Anchorage, February 16, 1952

Upon consideration of a written motion, filed by plaintiff, asking for an extension of time until February 15th in which to file its brief herein, the Court signed an Order allowing such motion.

Friday, May 16, 1952

There came Patrick J. Gilmore, Jr., United States Attorney, who presented to the court Findings, Conclusions and Judgment in this case, advising that he had served copies on plaintiff's counsel quite some time ago, but had not heard from them. The Court accepted the pleadings for examination before signing same.

Saturday, May 17, 1952

Findings, Conclusions and Judgment having heretofore been presented to the Court by plaintiff, and the same having been accepted for consideration, the Court at this time duly signed the same.

Wednesday, July 2, 1952

Upon consideration of defendant's Motion for Judgment notwithstanding the Decision of the Court, and in the alternative, for a new trial, the Court ruled that the Motion for Judgment notwithstanding the Decision is available only to the plain-

tiff; for this reason the motion would be denied. Motion for a new trial is also denied.

Friday, September 26, 1952

This case came before the court for hearing on defendant's Motion for an Order Directing Transmittal of Exhibits Offered and Refused as Part of the Record; also plaintiff's Motion for an Order Denying defendant's Motion for transmittal of copies of Exhibits offered and refused. Defendant had submitted the matter without oral argument. Edward A. Merdes appeared for plaintiff. After hearing plaintiff the Court ruled that if the exhibits were not left with the Court at the time of trial, the motion could not be granted. The exhibits were not left with the court at the time of being offered, but were attached to defendant's Motion.

[Title of District Court and Cause.]

NOTICE

Please take notice that the defendant is filing written interrogatories to be answered by the appropriate agent in the U. S. Forest Service, Dept. of Agriculture, and the Bureau of Public Roads, Dept. of Commerce, in the Ketchikan district of said departments pursuant to the Federal Rules of Civil Procedure. Defendant's written interrogatories are attached hereto and the plaintiff is invited to propound cross-interrogatories.

Dated at Ketchikan, Alaska, this 26th day of October, 1951.

/s/ W. C. STUMP,
Attorney for Defendant.

Defendant's Interrogatories

1. Under what sub-section of 36CFR 251.22 did the Regional Forester make the appropriation alleged in Paragraph 4 of the Complaint?

2. Under what statutory authority of the United States of America did the Regional Forester act in making the appropriation alleged in Paragraph 4 of the Complaint?

3. Do you have the original order making such appropriation on Sept. 3, 1940, and if so would you submit a true and correct copy thereof?

4. Will you please state the specific acts done by your department in complying with the applicable law or regulation for the perfection of such appropriation and the dates of said compliance as alleged in Paragraph 4 of the complaint?

5. Please specify and identify under which law of the United States or Departmental regulation by which the Regional Forester of the U. S. Forest Service at Juneau, Alaska, on February 9, 1951, made the appropriation claimed in Paragraph 5 of the complaint.

6. Please produce a true and correct copy of the order of appropriation alleged in Paragraph 5 of the complaint.

7. Will you please state the specific acts done by your department in complying with the applicable law or regulation for the perfection of such appropriation and the dates of said compliance as alleged in Paragraph 5 of the complaint?

8. Please specify what law or regulation the U. S. Forest Service and Bureau of Public Roads were executing in the appropriation and use of said land as alleged in Paragraph 7 of the Complaint.

9. Please specify the date sand, gravel and stone were mined and removed, together with the amounts thereof as alleged in Paragraph 7.

10. Please state the actual area used within said 37.5 acres of land in the removal of said sand, gravel and stone, as alleged in Paragraph 7 of the Complaint.

11. Is it not a fact that the material removed as alleged in paragraph 7 of the Complaint has been limited to the open creek bed of Whipple Creek which flows through said 37.5 acres of land?

12. Was it apparent from visual observation of said Whipple Creek within the boundaries of said 37.5 acres of land that the same contained a deposit of sand, gravel and stone?

13. Please state whether or not the operations alleged in Paragraph 7 of the Complaint were continuous or intermittent.

14. Please state whether the operations alleged

in Paragraph 7 of the Complaint involved permanent improvements and if so, the kind, character and cost thereof.

15. Please state whether or not there were any operations for the removal of sand, gravel and stone on said 37.5 acres of land on June 21, 1951.

16. Please state the method and machinery used by the Bureau of Public Roads in removing sand, gravel and stone from said 37.5 acres of land for the maintenance and repair of Government roads in the Ketchikan area.

17. How long prior to June 21, 1951, had there been any equipment on said 37.5 acres of land for the removal of sand, gravel and stone other than that referred to in Question 16?

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES 1-17

Comes now the defendant, United States of America, by Stanley D. Baskin, Assistant United States Attorney in and for the First Judicial Division, Territory of Alaska, and pursuant to Rule 33, Federal Rules of Civil Procedure, answers the interrogatories proposed by defendant, H. F. Schaub, as follows:

Interrogatory 1

Answer: The 91.13 acres of land were appropriated as a public service site pursuant to the provisions of 36 CFR 251.22 (1939 Supplement) and pursuant to the orders of William M. Jardine, Secretary of Agriculture, and William B. Greeley, Forester, dated February 1, 1926, and the regulations governing the administration of the United States Forest Service thereunder, as provided in the National Forest Manual, Regulations and Instructions, pages III, 57-L and 61-L, relating to reserve sites of the National Forests.

Interrogatory 2

Answer: Act of Congress dated June 4, 1897, 30 Stat. 35 and Act of Congress dated February 1, 1905, 33 Stat. 628.

Interrogatory 3

Answer: The appropriation consisted of the Regional Forester directing that the 91.13 acres of land be surveyed and set aside as a Public Service Site. The land was surveyed and posted during August 12 to 16, 1940, and approved by C. M. Archbold September 3, 1940. The survey was plated on the status maps and entered in the status records of the United Forest Service at Juneau and Ketchikan, Alaska. The final act of setting the 91.13 acres of land aside as a Public Service Site consisted of the approval of plat of the survey by Wellman Holbrook, Assistant Regional Forester, September 11, 1940.

Interrogatory 4

Answer: Answer to Interrogatory 4 is found in the answer to Interrogatory 3.

Interrogatory 5

Answer: Act of Congress dated June 4, 1897, 30 Stat. 35. Act of Congress dated February 1, 1905, 33 Stat. 628.

Interrogatory 6

Answer: A copy of the order of B. Frank Heintzelman, Regional Forester, United States Forest Service, Juneau, Alaska, dated February 9, 1951, was served on defendant's attorney, Wilfred Stump, on or about October 8, 1951, together with a Motion for Preliminary Injunction.

Interrogatory 7

Answer: The Bureau of Public Roads during May, 1950, prospected the 37.5 acres of land for deposits of sand, gravel, and stone for use in road building and other public purposes. On or about October 9, 1950, and again January 30, 1951, the Bureau of Public Roads advised the Regional Forester of the United States Forest Service, Juneau, Alaska, that it needed the 37.5 acres of land and requested that it be set aside for their use in the construction of highways, roads and other public purposes. The Bureau of Public Roads and the United States Forest Service determined that the 37.5 acres of land was valuable for its deposits of sand, gravel and stone for the use by the Bureau of Public Roads and other United States Government agencies for use in the construc-

tion of highways, roads, and other public works. On or about February 9, 1951, B. Frank Heintzelman, Regional Forester of the United States Forest Service, Juneau, Alaska, issued an order appropriating the 37.5 acres of land for the use of the Bureau of Public Roads.

The United States Forest Service and the Bureau of Public Roads has since about June 1, 1934, removed large quantities of sand, gravel, and stone from the 37.5 acres of land for use in construction of roads, highways, and other public works in the vicinity of Ketchikan, Alaska. The removal of the gravel, sand, and stone has been open and well known to the public.

Interrogatory 8

Answer: Acts of Congress dated June 4, 1897, 30 Stat. 35; Acts of Congress dated February 1, 1905, 33 Stat. 628; Federal Highway Act dated November 9, 1921, 42 Stat. 212, as amended, 23 USCA 1, et seq.

Interrogatory 9

Answer: The information requested in Interrogatory 9 was furnished defendant on or about October 8, 1951, in affidavit of Chester M. Archbold, dated October 8, 1951, and filed in the proceedings of this case.

Interrogatory 10

Answer: Approximately three acres.

Interrogatory 11

Answer: The actual area from which sand, gravel, and stone was mined and removed consisted

of the entire stream bed from Whipple Creek Bridge to a point above H. F. Schaub's discovery post, or a distance of about 1,600 feet. The average width developed is approximately 80 feet, but in places extending almost 200 feet in width, making a total of approximately three acres in the developed gravel pit. In developing the gravel pit the entire length and width was stripped of old down timber along the banks and in the streams. The current of the stream has been directed from one side of the channel to the other to undermine and wash the overburden away. During this procedure the stream bed has been lowered from 10 to 15 feet and has washed down many thousands of yards of gravel from upstream.

Interrogatory 12

Answer: Yes.

Interrogatory 13

Answer: The operation of developing the gravel pit on the 37.5 acres of land commenced in 1934 and has been continued from month to month and year to year up to the early part of 1951, as was necessary in developing the extensive road and highway system in the vicinity of Ketchikan, Alaska, and in the improvement and development of the resources of the Tongass National Forest.

Interrogatory 14

Answer: The operation of developing the Whipple Creek gravel pit required construction of a permanent 12- to 14-foot roadway leading from Tongass Highway to the gravel pit. The road leads

upstream along the north bank for a distance of approximately 1,400 feet. Permanent turnouts were maintained and improved. A permanent log loading ramp was constructed by A. W. Almquist, a contractor for the United States Forest Service, in 1949. The log ramp was left in its permanent position for use of the Bureau of Public Roads and is still on the property.

Interrogatory 15

Answer: On June 21, 1951, there probably was no actual removal of gravel being carried on by the Forest Service or Bureau of Public Roads. However, the pit was in good condition and ready for use when gravel, sand and stone were needed for the construction and improvements of highways, roads, and public projects in the vicinity of Ketchikan, Alaska.

On June 21, 1951, the Bureau of Public Roads and the United States Forest Service were planning and there was actual construction going on of extensive highway and road building work in which it was contemplated that more than 130,000 cubic yards of sand, gravel, and stone would be removed from the 37.5 acres of land commencing during the summer of 1951 and extending through 1952, until the projects were completed. This fact was well known to H. F. Schaub in particular, and the people of Ketchikan, Revillagigedo Island, Alaska, in general.

Interrogatory 16

Answer: Loaded trucks by hand and hand shovel, front-end loader attached to caterpillar 12

grader, power shovels, drag lines, bulldozers and the loading ramp constructed on the premises.

Interrogatory 17

Answer: Berg Construction Company, a contractor for the United States Forest Service in the construction and improvements of highways and roads in the vicinity of Ketchikan, Alaska, operated a dragline-shovel on the 37.5 acres of land during December, 1950, for the loading of trucks in removing sand, gravel and stone. Tractors were also used in the operation. The equipment was removed during December, 1950.

Dated at Juneau, Alaska, December 5, 1951.

/s/ STANLEY D. BASKIN,
Assistant U. S. Attorney.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 5, 1951.

[Title of District Court and Cause.]

ANSWER

The defendant for answer to the complaint alleges:

I.

Admits paragraph I.

II.

Admits paragraph II.

III.

Denies that plaintiff is owner of all the land described in paragraph III.

IV.

Admits that certain acts were performed as alleged in paragraph IV, but denies that any legal right existed permitting such acts to have any effect.

V.

Admits that a memorandum entitled "Correction Memorandum No. 11" was issued by the Regional Forester for Alaska, as alleged in paragraph V, but denies that any authority existed for the issuance thereof.

VI.

Admits paragraph VI, and adds that said order was effective on July 26, 1951, and that the withdrawal of said public land was "subject to valid existing rights."

VII.

Denies paragraph VII, except admitting that gravel has been removed from the creek bed which runs through said land very intermittently over the period stated.

VIII.

Denies paragraph VIII, except admits that defendant, on June 21, 1951, went upon a portion of said land and made a valid mineral entry thereon, and appropriated the same to his own use in conformity thereto.

IX.

Admits that defendant has taken possession of that part of said land upon which he made valid mineral entry, but denies that the same has damaged the plaintiff.

X.

Denies paragraph X of the complaint and specifically denies that defendant has removed any timber, overburden, sand, gravel or stone from said area, and alleges that all acts of defendant occurred on the area upon which defendant made valid mineral entry and was in possession thereof until restrained therefrom by order of this court.

XI.

Admits paragraph XI, but alleges that plaintiff entered into said contract with full knowledge that defendant had made mineral entry on part of said 37.5 acres of land and was in actual possession thereof.

XII.

Admits that part of paragraph XII which states that defendant would retain possession of that part of said area upon which he made mineral entry unless restrained therefrom.

First Defense

Defendant alleges that there is no legal authority for the Regional Forester of the United States Forest Service, Department of Agriculture, at Juneau, Alaska, any executive or employee of the Department of Agriculture, or of the Bureau of

Public Roads, or the Department of Commerce, to designate land within a National Forest of the United States of America for mineral development or use, to the exclusion of valid mineral entry being made on said land so designated. That said 37.5 acres of land was subject to mineral entry, as made by the defendant on June 21, 1951.

Second Defense

That if plaintiff claims said 37.5 acres of land on the theory of appropriation, the acts of plaintiff failed to constitute an appropriation; that the only use that has been made of any part of said 37.5 acres of land consisted of removal of sand and gravel from the creek bed which runs through said property; that a considerable portion of gravel removed from said 37.5 acres of land was from an area not claimed by defendant under his mineral entry; that the bulk of sand and gravel removed from the disputed area was done by private contractors and did not constitute the acts of the plaintiff; that plaintiff never made any permanent improvements on said disputed area; that the only structure on said disputed area consists of an abandoned log ramp which was placed there by a private contractor; that on June 21, 1951, said disputed area was unoccupied land within a National Forest of the United States of America and subject to mineral entry; that the Forest Service of the United States of America has no right to appropriate, develop, control, withdraw or use the minerals within the National Forests of the United States of America.

Third Defense

That on June 21, 1951, defendant made a valid mineral entry on the following property:

> From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less.

That part of said claim is within the area claimed by plaintiff; that defendant has complied with the laws of the United States of America and of the Territory of Alaska and is entitled to possession and control of the area herein described by authority of said laws; that said mineral entry was made prior to the time any part of said area was withdrawn from mineral entry by appropriate and lawful order.

Wherefore, defendant prays that plaintiff take nothing by its complaint herein; that the temporary restraining order heretofore entered by this court be dissolved and that defendant be restored to rightful possession of the property described in his Third Defense, and that he have his costs and dis-

bursements herein, and such other relief as the Court deems merited.

/s/ W. C. STUMP,
Attorney for Defendant.

[Endorsed]: Filed January 8, 1952.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The defendant admits, without prejudice to his claim of a valid mineral location, the allegations of pars. 3, 4, 5, 6, and 9 as amended, of the complaint; par. 7, except the allegation of use of the area; par. 8, except the allegations as to the removal of the timber and overburden by the defendant; par. 10, except the allegation as to the removal of timber and overburden and the allegation with reference to the obstruction of a way of ingress and egress, but admits obstructing the access road then existing; par. 11, with the qualification that the acts alleged were done by plaintiff with knowledge of defendant's location of a claim.

The parties agree that the first and second defenses present questions of law only, and plaintiff contends that the third defense is insufficient and will, in support thereof, produce evidence showing, or tending to show, that there was no discovery of mineral; that there was no valid location because the requirements of law with reference to staking, establishing and describing boundaries, etc., were

not complied with and that the location was made in bad faith. The plaintiff further contends that the area involved was not open to location on the ground that sand and gravel are not minerals within the meaning of the mining laws of the United States.

Dated at Juneau, Alaska, this 23rd day of January, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed January 25, 1952.

The attached opinion resulted in 16 U.S.C.A. 508b, allowing the Secretary of Interior to permit gravel mining. 2 U. S. Code Cong. Serv., 1950, p. 2662.

Opinion No. 5081

United States Department of Agriculture
Office of the Solicitor
Washington 25, D. C.

December 7, 1944.

Opinion for Lyle F. Watts
Chief, Forest Service

Dear Mr. Watts:

This is in reply to Mr. Kneipp's memorandum (U USES, R-9, Chippewa General) dated January 20, 1944, which requests my opinion as to the authority under which minerals may be developed on the approximately 193,000 acres of ceded and relin-

quished Indian reservation land set aside as a national forest under the act of May 23, 1908 (35 Stat. 271), and located in what is now known as the Chippewa National Forest, State of Minnesota. It is understood that your inquiry relates solely to the authority under which mineral resources may be developed generally for commercial purposes, and that you are not concerned with the exercise of possible emergency war powers for the development of certain strategic and critical minerals needed in the war effort.

Admittedly, no express authority has been given to the Secretary of Agriculture to permit the development of mineral resources on the lands under consideration. Mr. Kneipp states that Regulation U-13, as promulgated by the Secretary in 1942 for the development of mineral resources of lands acquired under the Weeks law, does not include the specific statutory reference to the act of May 23, 1908; that the State of Minnesota is not subject to the general mining laws, being specifically excluded from their operation by Revised Statute 2345; and that apparently disposal by the Secretary of the mineral resources on the concerned land would be authorized under his general power to regulate the use and occupancy of the national forests, in which case he could direct that all mineral resources on such lands thereafter should be subject to ultization only in conformity with Regulation U-13. You request my opinion as to the correctness of that assumption, or as to the proper means for authorizing mineral development on the concerned land.

It is my opinion that the Secretary of Agriculture is not authorized to dispose of the mineral resources of such lands under his general power to regulate the occupancy and use of the national forests. It is further my opinion that such lands are subject to the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181 et seq.), and that this act is the only existent authority under which any of the mineral resources of such lands may be developed. Under the Mineral Leasing Act, mineral deposits of coal, phosphate, sodium, potassium, oil, oil shale and gas are subject to disposition by the Secretary of the Interior.

The act of March 3, 1891 (26 Stat. 1095, 1103, 16 U.S.C. 471), authorized the President, from time to time, to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. Pursuant to the authority granted by this act, the President set apart and reserved large areas of public lands in the West as national forests. The act, however, did not contain any provision for the administration of the reserved lands, and they were withdrawn entirely from appropriation under the mining and other public land laws. No grazing could be permitted on national forest lands, no timber could be cut or removed therefrom, and the mineral resources thereof could not be explored or developed. This worked a great hardship upon settlers within and outside of the boundaries of the forests, retarded development of the West and resulted in the pas-

sage of the act of June 4, 1897 (30 Stat. 11), which provided for the administration of the national forests and the exploration and development of the mineral resources of certain of the lands within their boundaries. Op. Sol. 1385 (O.S.); 29 Cong. Rec. pt. 3 (1897) pp. 2480-2522 (2512-2517), and 2676-2693 (2677-2680).

By the act of June 4, 1897 (30 Stat. 11, 35, 16 U.S.C. 475), the purposes of these reservations were declared to be "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

This act also provided that the management and regulation of these reserves should be by the Secretary of the Interior, but in 1905 that power was transferred to the Secretary of Agriculture (33 Stat. 628, 16 U.S.C. 472), and by virtue of these statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and national forests * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction * * *" (30 Stat. 11, 35, 16 U.S.C. 551.) (Underscoring supplied.)

The act of June 4, 1897 (30 Stat. 11, 36, 16 U.S.C. 482), further provided that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to

entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." The act of February 1, 1905, supra, which transferred the general administration of forest reservations from the Secretary of the Interior to the Secretary of Agriculture, expressly retained in the Secretary of the Interior the execution of all laws affecting "the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." (16 U.S.C.A. § 472.)

Since the act of February 1, 1905, supra, retained in the Secretary of the Interior the execution of the provisions of the 1897 act expressly applicable to minerals, then, in the absence of other express authority, any powers which the Secretary of Agriculture might have to permit the development of mineral resources of the national forests would be limited to those which might be implied from his express authority to regululate the occupancy and use of the national forests.

It is well settled that public officers have not only the powers expressly conferred upon them by law, but also those which, by necessary implication, are requisite to enable them to discharge their duties. However, it is equally well settled that no powers will be implied except those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed.

27 Ops. Att'y Gen. 432 (1909); 36 id. 282 (1930); 37 id. 534 (1934); 38 id. 98 (1934).

The Constitution (Art. IV, sec. 3, cl. 2) commits to Congress the power "to dispose of and make all needful Rules and Regulations" respecting the property of the United States. It has uniformly been held that such provision confers on Congress exclusive jurisdiction to dispose of the land or other property of the United States. Such property cannot, therefore, be disposed of unless authorized by an act of Congress. This authority may be generally expressed, or may be specifically granted to permit the disposition in whole or in part of particular property rights. But until that power is given by Congress, expressly or impliedly, the executive is without power to act. 34 Ops. Att'y Gen. 320 (1924); 22 Comp. Gen. 563 (1942), and cases cited.

In its usual connection as interpreted by the courts the term "to dispose of" means "to alienate" or to "effectually transfer." United States v. Hacker, 73 Fed. 292 (S.D. Cal. 1896); Dayton Brass Castings Co. v. Gilligan, 267 Fed. 872 (S.D. Ohio 1920). The term has been held to include a lease and an easement which result in a diminishing of the interest, control or right of the owner in the property. Hill v. Sumner, 132 U. S. 118 (1889); Op. Sol. 4248.

It follows, then, that any attempt to alienate a part of the property, or, in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein without authority

from Congress is prohibited. Development of the mineral resources of the national forests involves an authorization to the developer to remove mineral deposits, and the passage of title to the minerals from the United States to the developer. Such action results in not only the occupancy and use but the alienation of a part of the lands and is a "disposal" of the property of the United States. 34 Ops. Att'y Gen. 320 (1924); Op. Sol. 264 (O.S.)

The Secretary of Agriculture has been granted broad powers to regulate the occupancy and use of the national forests and to preserve the forests thereon from destruction. He is limited in their exercise to the regulation of the occupancy and use of the national forests for the purposes for which the forests were established, to wit: "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States," and to preserve the forests thereon from destruction. United States v. Grimaud, 220 U. S. 506 (1911); Utah Power and Light Co. v. United States, 243 U. S. 389 (1917); 25 Ops. Att'y Gen. 470 (1905); 28 id. 522 (1910); 29 id. 303 (1912); 30 id. 263 (1914).

It is apparent from a review of the objects of the national forests that they can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of the mineral resources. Ops. Sol. 264 and 1866 (O.S.). Development of mineral re-

sources may be of benefit to the United States. However, the question is one of power, and that must come from Congress, and is not to be inferred from the fact that the proposed action would be highly beneficial to the United States. 20 Ops. Att'y Gen. 93 (1891).

Since development of the mineral resources of the national forests is not necessary to the accomplishment of the purposes for which the forests were established, or to their preservation, the Secretary of Agriculture does not have any implied authority to dispose of mineral resources as such action involves the exercise of a power beyond the scope of his general supervisory powers. Op. Sol. 264 and 1866 (O.S.).

In an opinion of this office dated October 20, 1931 (Op. Sol. 12920 (O.S.)), it was held that the authority conferred upon the Secretary of Agriculture to regulate the occupancy and use of the national forests was ample for the issuance of special use permits for the development of the mineral resources of certain national forest lands, which, by virtue of overlapping withdrawals, were not subject to mineral location under the mining laws, if the proposed mineral development would not interfere with the use of the lands for the purposes for which they had been withdrawn. No reasons were advanced for such conclusion, and for the reasons stated in this opinion and those stated in the opinions of the office dated March 9, 1915 (Op. Sol. 264 (O.S.)), and February 24, 1916 (Op. Sol. 1866 (O.S.)), that decision is hereby overruled.

In passing, the following provision of the act of June 4, 1897 (30 Stat. 11, 36), may appropriately be noted:

> "Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior [Agriculture]. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations." (Underscoring supplied.)

In an opinion of this office dated May 26, 1941, (Op. Sol. 3344), it was stated that "In our opinion, this provision was not intended to grant any right to prospect, locate and develop the mineral resources of the national forest lands. The act, of which it is a part, provides generally for the administration of national forests. It seems clear that the provision quoted was intended only to make certain that the act would not be construed to deny or in any way interfere with mining rights obtained under other laws." See also Op. Sol. 1385 (O. S.).

The Secretary of Agriculture promulgated Regulation U-13, dated September 9, 1942, (7 Fed. Reg. 7178, 7179), pursuant to the authority granted to him by the act of March 4, 1917 (39 Stat. 1134, 1150, 16 U.S.C. 520), which provides in part:

> "The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the act of March 1, 1911, (36 Stat. 961), known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States; * * *."

The authority granted the Secretary of Agriculture by this act is expressly limited to the mineral resources of lands acquired under the Weeks law. The land here involved was not acquired under the Weeks law, and no subsequent legislation has extended the purview of the 1917 act to these lands.

In this situation and in the absence of any implied authority to permit development of the mineral resources of national forests, the Secretary of Agriculture is not authorized to direct that the mineral resources of the concerned land are subject to utilization in conformity with Regulation U-13.

The concerned land, prior to being set aside as a national forest, was part of an Indian reservation established for the Pillager and Lake Winnebigoshish bands of Chippewa Indians. The Mississippi bands of Chippewa Indians, by the treaty of Feb-

ruary 22, 1855 (10 Stat. 1165), ceded, sold, and conveyed to the United States "all their right, title, and interest in, and to," the lands then owned and claimed by them, in the Territory of Minnesota. Out of the ceded lands there were then reserved and set apart particularly described tracts or reservations for the permanent homes of the Indians. By Executive orders dated November 4, 1873, and May 26, 1874, (Sen. Doc. No. 319, 58th Cong. 2d Sess. (1903-04), 851), the tract reserved for the use of the Pillager and Lake Winnebigoshish bands was enlarged, the orders providing that the additional lands therein embraced were "withdrawn from sale, entry, or other disposition," and were set apart for the use of the Indians. Some of the land under consideration was a part of the tract reserved for the use of the Pillager and Lake Winnebigoshish bands of Indians by the treaty of February 22, 1855, supra, and the balance was a part of the lands added to the original reservation by the aforementioned Executive orders.

Under the act of January 14, 1889, (25 Stat. 642), as amended by the acts of June 27, 1902, (32 Stat. 400), and May 23, 1908, (35 Stat. 268), provision was made for the complete cession and relinquishment by the Chippewa Indians of all their title and interest in and to all of the lands in their reservations, excepting the lands in two reservations not here involved, and Congress, in the last mentioned act, expressly set aside the concerned land as a national forest.

Under these circumstances, this land, prior to

being set aside as a national forest, was "Indian land." The fee of the land was in the United States, subject to a right of occupancy by the Chippewa tribe of Indians (Minnesota v. Hitchcock, 185 U. S. 373 (1902)). Upon the appropriation of this land by Congress as a national forest, the entire legal and beneficial title merged in the United States (Chippewa Indians v. United States, 305 U. S. 479 (1939)). The land thereupon had the same status as though it had been restored to the public domain and thereafter set aside as a national forest.

It is understood that in the administration of the Chippewa National Forest this land has been treated and administered as public domain forest land. Both land and timber in this forest have been exchanged, under the act of March 20, 1922 (42 Stat. 465, 16 U.S.C. 485, 486), with the approval of the Secretary of the Interior, for privately owned lands within the exterior boundaries of the forest.

The act of May 23, 1908, supra, which set this land aside as a national forest, does not contain any provision directly authorizing disposal of the mineral resources thereof. The act, however, does provide that "the national forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto." (Underscoring supplied.) The general laws governing the disposition of the mineral resources of public domain lands are the general mining laws of May 10, 1872, (17 Stat.

91, 30 U.S.C. 21 et seq.), and the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181 et seq.).

The general mining laws were expressly made applicable to public domain forest lands that were subject to entry under the existing mining laws by the act of June 4, 1897, supra, which provides for the administration of the national forests. The public domain forest land here involved is not subject to entry and location under the general mining laws, as the State of Minnesota has been excepted from the provisions thereof. Section 2345 of the Revised Statutes, passed in 1873 (17 Stat. 465, 30 U.S.C. 48), provides that the mineral lands situated in that State and in the States of Michigan and Wisconsin "are declared free and open to exploration and purchase according to legal subdivisions, in like manner as before the 10th day of May, 1872 * * * Such lands shall be offered for public sale in the same manner and at the same minimum price as other public lands." The purpose of the statute was to except the mineral lands in the named States from the mining laws enacted in the previous year and permit their disposal under the land laws. Deffeback v. Hawke, 115 U. S. 392 (1885). Accordingly, the general mining laws are not applicable to this particular public domain forest land.

The Mineral Leasing Act expressly declares that it is applicable to mineral deposits on lands "owned by the United States, including those in national forests," excepting lands acquired under the Weeks

law. The lands here involved are public domain forest lands and they are, accordingly, subject to this act. See 40 Ops. Att'y Gen. 63 (1943).

Additional reasoning for the applicability of the Mineral Leasing Act to these lands is set out in an opinion of this office dated November 1, 1944, (Op. Sol. 5066). In that opinion it was stated:

> "The language of the Mineral Leasing Act specifically including the lands in the national forests with the lone exclusion of those acquired under the Weeks Law is plain. It leaves no patent doubt as to the intent of Congress that the provisions of the Mineral Leasing Act were to apply to all of the national forest lands which Congress had theretofore authorized to be acquired and thus set apart as national forests other than those acquired under the Weeks Law, as well as those which the Congress had theretofore set apart and reserved or authorized to be set apart and reserved as national forests. If there should be any doubt as to such intention, it is completely dispelled by the legislative history of the Mineral Leasing Act."

Sincerely yours,

/s/ ROBERT H. SHIELDS,
Solicitor.

Dictator
WJMaxey:IP:MTH
11-24-44
F 01426

[Title of District Court and Cause.]

OPINION
Filed April 3, 1952

P. J. GILMORE,
U. S. District Attorney and

STANLEY D. BASKIN,
Assistant U. S. District Attorney,

For Plaintiff.

W. C. STUMP and
DONALD McL. DAVIDSON,

Attorneys for Defendant.

This controversy involves the validity of the defendant's location, under the mining laws, of a sand and gravel claim on June 21, 1951, upon a part of a tract of 37.5 acres of land on Whipple Creek in the Tongass National Forest, Alaska, which, on February 9, 1951, had been reserved by the Regional Forester for the use of the Bureau of Public Roads as a source of road building material, and on July 26, 1951, withdrawn from entry by the Secretary of the Interior, Public Land Order No. 734, 16 F.R. 7329. This tract is embraced within the exterior boundaries of a tract comprising 91.13 acres, which on September 11, 1940, was set aside as a public recreation site under 16 U.S.C.A. 497 and the regulations made thereunder.

It appears that the plaintiff has used a part of the tract bordering on Whipple Creek as a source

of gravel and sand since 1934 in connection with the construction and maintenance of forest highways, roads and trails; that it is now engaged in highway construction in the vicinity; that this is the only economically feasible source of road building material, and that as it is removed it is replenished by freshets. It further appears that the extent and character of the deposit of sand and gravel were ascertained only after considerable exploratory work, involving the construction of an access road 1400 ft. in length, the sinking of shafts, removal of the overburden of trees, brush, windfalls and soil, which, in conjunction with the removal of sand and gravel, has resulted in a gravel pit of about 3 acres in area. A ramp, constructed in the pit to facilitate the loading of trucks, appears to be the only improvement worthy of note.

Upon making his location, defendant barricaded the access road and excluded the plaintiff from the pit.

Plaintiff contends that the location is invalid because there was no discovery of mineral; that the land was not open to entry or location under the mining laws; that sand and gravel are not minerals within the purview of the mining laws; that the location was made by the defendant in bad faith for the purpose of appropriating the benefits of plaintiff's exploration, development and improvements, after learning of the highway construction program now in process of execution and that the invitation for bids for this construction specified the use of Whipple Creek gravel. Plaintiff further

contends that the local statutory requirements governing the location and staking of mineral claims were not complied with in several particulars, and seeks injunctive and other relief.

The defendant, while admitting that the several administrative steps testified to have been taken, denies that they were of any effect so far as precluding entry and location under the mining laws, except the withdrawal order of July 26, 1951, which he contends came too late to affect the validity of his location.

From the uncontroverted facts in evidence, it is clear that the area embracing the pit and improvements could not lawfully be included in a mineral location even in absence of any withdrawal of the area. It was in the actual possession and use of the plaintiff. That such use was intermittent and, in some cases, through the instrumentality of its contractors, if of no importance. It was used to the extent required by the plaintiff in the discharge of its function of administering the Tongass National Forest, with special reference to the construction of highways, roads and trails. Not only was this use a matter of common knowledge, but the pit itself and the character of the improvements were such as to put any person on notice that it was in the actual use of another. Regardless of what more, if anything, might be required to be shown in support of the claim of a private individual, it must not be overlooked that the United States, as absolute owner of the land, is not required to show more than that its use has been commensurate with its

obligations in the execution of its functions. When the defendant included the gravel pit in his location, the land was in the actual use and possession of the United States, which had made valuable and permanent improvements thereon and in connection therewith. Since it is well settled that even as between private individuals no right can be initiated to land in the actual possession of another, a fortiori, no such right can be initiated as against the owner in actual possession. Carr v. United States, 98 U. S. 433; Ritter v. Lynch, 123 Fed. 930, 933-5; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4; aff. 190 U. S. 301; Lyle v. Patterson, 228 U. S. 211. Although the foregoing cases did not involve national forest lands, this distinction is not material here. By analogy it may logically be said that since the United States had already made an appropriation of the sand and gravel of Whipple Creek, the pit was not open to relocation by the defendant or any other person even in the absence of a special use permit or an order setting it aside. Gavigan v. Crary, 2 Alaska 370, 380; 5 L.D. 376.

So much for the gravel pit and access road, as distinguished from the remainder of the 37.5 acre tract over which the defendant's claim overlaps. Turning now to a consideration of the question as to the effect of the withdrawal of this tract, it is noted that the plaintiff relies principally on the special use permit issued February 9, 1951, by the Regional Forester to the Bureau of Public Roads, pursuant to Secs. 251.1 and 251.2, 36 C.F.R., which regulations were in turn promulgated under 48

U.S.C.A. 341 and 23 U.S.C.A. 18, the latter of which authorizes the appropriation of any part of the public lands or reservations of the United States as a source of material for the construction or maintenance of forest roads and highways.

48 U.S.C.A. 341 provides that:

> "The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for purposes of residence, recreation, public convenience, education, industry, agriculture, and commence, not incompatible with the best use and management of the national forests, for such periods as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws:"

Under the authority conferred thereby, the Secretary of Agriculture, by regulation, 36 C.F.R. 255, Secs. 251.1(b) and 251.2, authorized the issuance of special use permits by the Regional Forester upon delegation of such authority to him by the Chief Forester. Such delegation was proved, plaintiff's exhibit No. 2, and was exercised by the Regional Forester in issuing the special use permit of February 9, 1951, which, omitting the description provides that:

> "The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building material:"

This would appear to be sufficient, since such order need not be couched in any particular phraseology. U. S. v. Payne, 8 Fed. 883, 888, Wolsey v. Chapman, 101 U. S. 755, 770. Moreover, it does not appear that it is essential that such withdrawal be made a matter of public record even though the area withdrawn is a part of the public domain, as distinguished from a forest reservation, although it appears that it has been the practice to note such withdrawals of public lands on the records of the local and general land offices, apparently out of caution in anticipation of the extension of public land surveys to such areas. In this instance it appears that the withdrawal of February 9, 1951, was made a matter of record in the offices of the United States Forest Service in Juneau and Ketchikan and that such records were open to inspection by the public generally. I am of the opinion that this was a valid withdrawal and that thereafter the land was no longer open to entry or location under the mining laws.

Defendant concedes that the order of the Secretary of the Interior of July 26, 1951, 16 F.R. 7329, would be effective if it had antedated defendant's

location. The contention that it came to late to affect defendant's location, however, overlooks the doctrine of relation back. The case here under consideration is one in which there are two claimants to the same sand and gravel deposit, one of whom has attempted to appropriate it by a location made on June 21, 1951, under the mining laws, while the other between February 9 and March 8, 1951, requested its withdrawal for the use of the Bureau of Public Roads. This designation in itself would, in conjunction with concurrent use, appear to be a sufficient appropriation to segregate the area from the national forest land. At any rate, it would appear by analogy that the plaintiff acquired an inceptive right to the area for the purpose specified in the request for the withdrawal before the defendant acquired any right by virtue of his location. It is a well settled rule of law that the first in time is the first in right and hence, when the Secretary of the Interior withdrew the area on July 26, 1951, assuming his authority extends to the withdrawal of national forest lands, the United States became entitled to the exclusive use and possession of the tract and this right, under the doctrine referred to, related back to the time of the request of the Regional Forester, Knapp v. Alexander, 237 U. S. 1, and cut off all intervening rights including any rights acquired by the defendant by virtue of his location.

From the foregoing, I conclude that there was an appropriation and withdrawal of this tract from entry and location under the mining laws, not only

by actual use and occupation so far as the area embracing the pit and access road is concerned, but also by the formal act of the Regional Forester and that, therefore, the defendant's claim is invalid. U. S. v. Hammer, decided by the Register of the United States Land Office at Anchorage, Alaska, Contest No. 442, January 16, 1941, affirmed by the Commissioner of the General Land Office, May 6, 1941. Wilcox v. Jackson, 13 Pet. 498; Lyders v. Ickes, 84 Fed. (2) 232; Gavigan v. Crary, 2 Alaska 370; United States v. Mobley, 45 Fed. Supp. 407, 46 Fed. Supp. 676.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE DECISION OF THE COURT AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendant H. F. Schaub moves for judgment dismissing the complaint and dissolving the restraining order heretofore issued herein notwithstanding the decision of the court of April 3, 1952, and, in the alternative and without waiving either of said motions, moves for a new trial upon the following grounds:

1. Correction Memorandum No. 11, issued February 9, 1951, is not a permit within the meaning of 48 U.S.C.A. § 341, in that:

(a) It was not issued for purposes of residence, recreation, public convenience, education, industry, agriculture and commerce;

(b) It was not in form a special use permit, nor designated such as required by regulations of the Secretary of Agriculture;

(c) It was not issued pursuant to the procedure prescribed by the Secretary of Agriculture, nor did it include the stipulation required for such permits for special uses; and

(d) It was not intended as a permit under 48 U.S.C.A. § 341, in that the plaintiff believed both before and after its issuance and up to a date subsequent to the trial that such memorandum did not withdraw the tract from the operation of the mineral leasing law, and plaintiff did not intend to withdraw such tract from the operation of the mineral leasing law by such memorandum, whereas a permit under 16 U.S.C.A. § 341 would have withdrawn the tract from the operation of such law.

2. The court erred in excluding from evidence a letter dated February 7, 1951, by the Forest Service, and in excluding from evidence certain other letters from the Bureau of Public Roads, Department of Commerce, which letters show that Correction Memorandum No. 11 was not a permit under 48 U.S.C.A. § 341, but was an administrative step within the Regional Forester's office taken in con-

nection with the procedure for withdrawing the tract prescribed by 43 U.S.C.A. § 141 and Executive Order 9337.

3. The court erred in excluding from evidence U. S. Forest Circular U-220, which further demonstrated that Correction Memorandum No. 11 and all other actions of the plaintiff were pursuant to 43 U.S.C.A. § 141 and Executive Order 9337 and were not pursuant to 48 U.S.C.A. § 341.

4. There was no evidence that Correction Memorandum No. 11 was ever filed in any public record, or when it was filed in the Office of the United States Forest Service, or that such records are public records.

5. There was no evidence that the 37.5 acre tract, or any part of it, was in the actual possession of plaintiff, or any of its officers or agents, and the evidence was uncontroverted that no one had done any work upon the premises or extracted any gravel therefrom for more than six (6) months prior to defendant's mineral location.

6. The court erred in holding that the order of the Secretary of the Interior of July 26, 1951, related back to Correction Memorandum No. 11 of February 9, 1951, to make the latter a valid and effective withdrawal as of that date because (a) the order of the Secretary of the Interior did not include all of the tract described in Correction Memorandum No. 11, and (b) the order of the Secretary of the Interior expressly makes the tract subject

to the mineral leasing laws, and the Secretary of the Interior has no power to so modify or change a permit issued pursuant to 48 U.S.C.A. § 341.

7. That the court erred in the law in holding that the Secretary's order of July 25, 1951, related back to February 9, 1951; and in holding that rights in land may not be initiated in lands occupied by others; and in holding that the Secretary of the Agriculture has any power to authorize mining in national forests by permit or otherwise; and in holding that the Secretary of Agriculture may delegate his power to issue permits under 48 U.S.C.A. § 341.

Wherefore, defendant submits this motion upon all the papers and proceedings herein and the memorandum filed herewith and prays the court to consider the same without oral argument or if the court desires oral argument that a date be set for the same and further prays for judgment notwithstanding the written decision of the court of April 3, 1952, or in the alternative, for a new trial.

/s/ WILFRED STUMP,

/s/ DONALD McLELLAN DAVIDSON,

Attorneys for Defendant.

[Endorsed]: Filed April 12, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Action by the United States of America against H. F. Schaub, for a permanent injunction.

This cause having been tried by the Court without a jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

I. That the defendant, H. F. Schaub, is a resident of Division Number One of the United States District Court, Ketchikan, Alaska.

II. That the 37.5 acres herein in dispute is, and at all times herein mentioned, was part of the Tongass National Forest, Revillagigedo Island, Alaska, located on or about Whipple Creek, 11.5 miles north of the City of Ketchikan, and more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

That defendant's specific claim is as follows:

From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less.

That a portion of said claim is within 37.5 acres.

III. That said land is, and at all times herein mentioned has been, included within the boundaries of the Tongass National Forest and under the jurisdiction and administration of the Secretary of Agriculture as part of a National Forest.

IV. That on June 21, 1951, the defendant located a mining claim for sand and gravel, a portion of which is within said 37.5 acres, which mining claim is known as the "Whipple Creek Number 1 Placer Claim," and notice of which location was recorded on the 27th day of June, 1951, at 10:40 a.m. in Volume "14" of mining records at P. 29 of said records at the Ketchikan office wherein said claims are recorded. That defendant, H. F. Schaub, located such claim openly and peaceably.

V. That since 1934 plaintiff has used part of the

tract bordering Whipple Creek as a source of sand and gravel in connection with the construction and maintenance of forest highways, roads and trails. Said use is more particularly described as follows:

(1) Construction of an access road approximately 1,200 feet in length by contractors working under, by and for the Bureau of Public Roads in 1949 and 1950.

(2) Sinking of numerous testing shafts throughout the 37.5 acre tract in June, 1950, by the Bureau of Public Roads.

(3) Removal of the overburden of trees, brush, windfalls and soil covering about a 3-acre area in and along the stream bed of Whipple Creek by contractors working by and for the Bureau of Public Roads and Forest Service at various times from 1934 up to December, 1950.

(4) Construction of a log ramp by a contractor working by and for the Bureau of Public Roads and Forest Service in 1949.

VI. That on February 9, 1951, the Regional Forester approved and issued to the Bureau of Public Roads Correction Memorandum No. 11, which described said 37.5 acres and provided:

> "The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building materials."

VII. That Correction Memorandum No. 11 was a special use permit of the Regional Forester issued by virtue of authority delegated to him by the Secretary of Agriculture of the United States, (given to Secretary of Commerce by 1949 Reorganization Plan No. 7 Notes under 23 U.S.C.A. 2, and Reorganization Plan No. 5, paragraphs 1, 2, effective May 24, 1950, set out under 5 U.S.C.A. 591) under the provisions of the Act of March 30, 1948, 48 U.S.C.A. 341, and Act of November 9, 1921, 23 U.S.C.A. 18 and pursuant to regulations promulgated thereunder by the said Secretary of Agriculture, Sections 251.1 and 251.2, 36 C.F.R.

VIII. That said special use permit by its terms reserved and set aside the said 37.5-acre tract hereinabove described, for the use of the Bureau of Public Roads as a source of road building materials.

IX. That the United States Forest Service between February 9 and March 8, 1951, requested the Secretary of the Interior by formal request in writing to withdraw the 37.5-acre tract from all forms of location and entry under the public land and mining laws and from leasing under the mineral leasing act except for oil and gas deposits, providing no part of the surface of the lands shall be used in connection with prospecting, mining and removal of oil and gas.

X. That the Secretary of the Interior withdrew the 37.5-acre tract described below from all forms of entry under the public land laws including the mining laws, but not including the mineral leasing

laws, by Public Land Order 734, dated July 20, 1951, and published July 26, 1951, in the Federal Register, Volume Number 16, page 7329:

> Beginning at a point on the southeast boundary of U. S. Survey No. 2802 from which corner No. 1 of said survey bears N. 30° E., 220 feet, thence by metes and bounds:
>
> N. 30° 00′ E., 817.0 feet to corner No. 6 of U. S. S. 2803; No. 46° 30′ E., 860.0 feet; S. 43° 30′ E., 1,080.0 feet; S. 46° 30′ W., 1,160.0 feet; S. 83° 57′ W., 548.0 feet to PC 566 + 57.4 on southeast edge of the right-of-way of North Tongass Highway; Southerly and westerly, 353.0 feet parallel to and 33 feet from the center line of North Tongass Highway; N. 12° 00′ W., 437.0 feet to point of beginning.

XI. That said defendant, H. F. Schaub, without permission from plaintiff or said Regional Forester, and under claim of right so to do by virute of the mining claim mentioned in Finding IV above, has taken possession of said land and premises and has erected barricades across right of way built by plaintiff for ingress and egress to and upon the land herein in dispute; moved a trailer house upon said land; removed timber and overburden; mined and removed sand and gravel; further dug, excavated and interfered with the occupancy and use of said land by the Forest Service and the Bureau of Public Roads, its officers, agents, employees and contractors, who thereto are the persons authorized by said Regional Forester under

said special use permit. That said defendant threatens to dig, excavate and interfere, unless enjoined therefrom by order of this Court, and that plaintiff has no plain, speedy or adequate remedy at law for said acts and conduct on the part of the defendant, and unless said acts and conduct are enjoined, plaintiff will suffer irreparable injuries.

XII. That no proof was offered or received upon the trial of this case that the issues herein involved had ever been introduced in or presented to the United States Department of Agriculture or the Secretary of Agriculture of the United States under any rules or regulations promulgated by said Secretary of Agriculture.

XIII. That the complaint in this action was filed at the request of the Regional Forester, and upon the direction of the Attorney General.

Conclusions of Law

I. That possession of and title to the above-described 37.5-acre tract is in the Plaintiff, United States of America, which is entitled to the exclusive possession thereof as against the defendant.

II. That there was an appropriation and withdrawal of the road and three-acre area included within the 37.5 acres, from entry and location under the mining laws by actual use and possession as more particularly described in Finding V supra.

III. That the land herein in dispute was, by issuance of the above-mentioned special use permit

on February 9, 1951, definitely and conclusively appropriated and set aside for a particular purpose, authorized by the said act of March 30, 1948, 48 U.S.C.A. 341, and said act of November 9, 1921, 23 U.S.C.A. 18, and pursuant to regulations promulgated by the Secretary of Agriculture Sections 251.1 and 251.2 36 C.F.R., and said lands, for that reason, were and are not subject to subsequent location under the mining laws of the United States of America and of the Territory of Alaska, or either of them, while said permit remains in force and effect.

IV. That Public Land Order 734, issued by the Secretary of Interior on July 20, 1951, published on July 26, 1951, in the Federal Register, Volume Number 16, page 7329, related back to said formal written request for withdrawal by the Forest Service to said Secretary of Interior between February 9 and March 8, 1951, and conclusively and effectively withdrew and appropriated said land in dispute from any and all forms of mineral entry as of February 9, 1951, even though the defendant made his said mineral entry on or about June 21, 1951.

V. That said defendant, H. F. Schaub, his servants, agents or employees has no right, title, estate, claim, lien, or interest of whatsoever kind or nature, in or to any part of said 37.5-acre tract and that the plaintiff is entitled to a decree restoring exclusive possession thereof to the plaintiff and persons authorized by it.

VI. That the plaintiff is entitled to a writ of permanent injunction, permanently enjoining the defendant from removing sand and gravel from the 37.5-acre tract described in Finding II and requiring defendant to remove any and all barricades and property put on said 37.5-acre tract, and from interfering in any way with the occupancy and use of said 37.5-acre tract by persons or companies authorized by plaintiff and from asserting any claim or interest whatsoever arising out of or by virtue of said "Whipple Creek Number 1 Placer Claim" in or to said 37.5-acre tract, or any part thereof, adverse to plaintiff and persons or companies authorized by plaintiff, all without prejudice to defendant's rights, if any, in any land outside of said 37.5-acre tract.

Dated at Juneau, Alaska, this 17th day of May, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 17, 1952.

In the District Court for the Territory of Alaska
Division Number One at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

H. F. SCHAUB,
Defendant.

JUDGMENT

The above-entitled and numbered cause having been heard on the 25, 26, and 28th days of January, 1952, and all parties thereto having appeared by counsel, and the Court having heard the pleadings, the evidence, and arguments of counsel for both parties having been heard by the Court and briefs having been filed by both parties, the Court having given due consideration thereto, and findings of fact and conclusions of law having been made by the Court, entered herein and made a part hereof, and it appearing to the Court that the plaintiff should be granted the relief prayed for in its complaint, it is therefore on this the ninth day of April, A.D. 1952:

Ordered, Decreed and Adjudged, that the preliminary injunction heretofore granted and issued by this Court herein on the 15th day of October, 1951, and entered in the office of the Clerk of this Court on the 15th day of October, 1951, be and the same hereby is made perpetual and permanent and that the defendant, H. F. Schaub, his servants,

agents and employees be permanently and perpetually enjoined and restrained from:

1. Barricading plaintiff's right-of-way to, on and from the 37.5 acres of land more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6, on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less,

using and occuping said land; mining and removing sand, gravel and stone from said land; interfering with the plaintiff, its departments, agencies, officers, servants, agents, employees, and contractors in using and occupying said land, in mining and removing sand, gravel and stone from said land.

2. That defendant be and is hereby required to remove from said 37.5 acres of land the trailer house and any and all other property and equipment belonging to defendant.

3. That defendant be and is hereby required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of

land and the right-of-way to, on and from said land.

4. That defendant's claim of right, title and interest in and to his mining claim entitled "Whipple Creek No. 1 Placer Claim," within the said 37.5 acres of land, said mining claim more particularly described as follows:

> From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1,136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less, be and is hereby declared null and void insofar as his claim of right, title and interest therein embraces or constitutes a part of the said 37.5 acres of land.

It Is Further Ordered, Adjudged and Decreed that the defendant, H. F. Schaub, pay the cost of these proceedings to be taxed by the Clerk of this Court and that execution be issued for the same.

And that the Court grant such other and further relief as to it may seem just.

Done in open court this 17th day of May, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Not approved.

Two copies received this 11th day of April, 1952.

/s/ W. C. STUMP,
Of Attorneys for Defendant.

[Endorsed]: Filed May 17, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that H. F. Schaub, defendant in the above action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 17, 1952.

/s/ WILFRED C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

BOND FOR STIPULATION FOR COSTS

Whereas, a complaint was filed in this Court by the United States of America against H. F. Schaub for the reasons and causes in the said complaint mentioned; and the said H. F. Schaub, defendant, and General Casualty Company of America, Surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the Defendant or its Surety, execution may issue against their goods, chattels and lands for the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator, undersigned, shall be and is bound in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that the Defendant above named shall pay all such costs as shall be awarded against it by this Court.

Dated this 18th day of June, 1952.

/s/ H. F. SCHAUB.

[Seal] GENERAL CASUALTY
COMPANY OF AMERICA,

By /s/ DOUGLAS S. BROWN,
Attorney-in-Fact.

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: P. J. Gilmore, Jr., and Stanley D. Baskin, attorneys for plaintiff:

Sirs:

Please Take Notice that the annexed motion for an order directing the transmittal of exhibits offered in evidence by defendant and refused, as part of the record on appeal, will be submitted to the above court forthwith upon all of the papers and proceedings herein and motion and memorandum hereto annexed and without oral argument unless the court orders otherwise.

/s/ W. C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

MOTION FOR AN ORDER DIRECTING TRANSMITTAL OF EXHIBITS OFFERED AND REFUSED AS PART OF RECORD ON APPEAL

Defendant, H. F. Schaub, upon all of the papers and proceedings herein, hereby moves for an order directing the transmittal of the following described exhibits offered in evidence by defendant upon the

trial of this action and refused admission as part of the record on appeal:

1. That certain letter or memorandum dated February 7, 1951, by Frank Heintzleman to the Chief, U. S. Forest Service, Washington, D. C., with the attachments thereto, a copy of which exhibit is annexed hereto, marked "Exhibit A" and made part hereof.

2. United States Department of Agriculture, Forest Service, Circular No. U-220, dated December 16, 1949, entitled "U Classification, Withdrawals, Executive Order 9337, Recreation Areas (Administrative Sites)," a copy of which exhibit is annexed hereto, marked "Exhibit B," and made part hereof.

3. Reg. U-1, U-2 and U-3 appearing at pages NF-G3 (1) to NF-G3 (5), U. S. Forest Service Manual, a copy of which exhibit is annexed hereto, marked "Exhibit C," and made part hereof.

The grounds for this motion are as follows:

1. Each of the exhibits was offered and identified at the trial. No objection was made to their authenticity or competency. They were denied admission upon the grounds of irrelevancy, although their materiality was pointed out at that time. Defendant's offer of the exhibits for identification was also refused.

2. The decision of the court dated April 3, 1952, states that there was a withdrawal of the land from mineral entry on February 9, 1951, by a certain

document entitled and upon trial designated as Correction Memorandum No. 11 and referred to in the court's opinion as a special use permit. It was defendant's position that this document was merely an administrative step or record leading up to a withdrawal of the land from mineral entry by the Secretary of the Interior. Exhibit A, the first part of which is dated two days prior and its attachments dated four days subsequent to Correction Memorandum No. 11, shows conclusively that the Forest Service was at that time pursuing the procedure of withdrawal by the Secretary of the Interior. Exhibit B shows conclusively that the procedure followed is inconsistent with a withdrawal under any other authority.

3. The decision of the court further states that the Secretary of the Interior withdrew the area on July 26, 1951, and that this withdrawal was effective as of February 9, 1951, under "the doctrine of relation back." Not only does Executive Order 9337, granting the power to the Secretary of the Interior, expressly state that such orders are not effective until published in the Federal Register, but also the Forest Service Regulations set out in Exhibit C provide:

> "Public land order withdrawals are made by the Secretary of the Interior under the provisions of Executive Order No. 9337 with the recommendation of the Secretary of Agriculture. They must be cleared through the Budget Bureau and Attorney General's office

and are not effective until published in the Federal Register." (Underlining added.)

Applying "the doctrine of relation back" to such orders overlooks both the express terms of their underlying authority and the interpretation placed upon them by the plaintiff. That doctrine would simply make such orders effective at some time antedating publication in the Federal Register contrary to the law and practice governing such orders.

Exhibit C also shows that Correction Memorandum No. 11 was only an administrative step leading to a withdrawal by the Secretary of the Interior and not a special use permit. It further discloses the requirements as to posting necessary in connection with a special use permit. Plaintiff offered no evidence at the trial that there was compliance with these posting requirements.

4. These exhibits, having been relevant and material to the issues in the case and having been refused admission on no ground other than being immaterial or irrelevant, should be made part of the record on appeal so that the appellate court may review all of the evidence offered at the trial of the action.

Wherefore, defendant submits this motion upon all the papers and proceedings herein and prays the court to consider the same without oral argument, or if the court desires oral argument that a date be set for the same, and further prays that the court enter an order directing that Exhibits A, B, and C annexed hereto, or copies thereof, ex-

hibits offered in evidence by defendant upon the trial of this action and refused admission, be transmitted as part of the record on appeal.

Respectfully submitted,

/s/ W. C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

EXHIBIT A

Forest Service, Juneau, Alaska

February 7, 1951.

Chief, U. S. Forest Service, Washington, D. C.,
B. Frank Heintzleman, Regional Forester,
By: Chas. G. Burdick, Acting.
U-Classification, R-10, Alaska, Withdrawals, E. O. 9337, Public Service, Area, Whipple Creek, Tongass (S).

Attached material pertains to the withdrawal of a public service area at Whipple Creek, near Ketchikan, Alaska, in accordance with the procedure outlined in Circular U-220 and supplement. Two prints of a plat of the area attached.

This area has become extremely important as the only economical source of road building material adjacent to North Tongass Highway. The Bureau of Public Roads will need much of the gravel from this source in their construction program on the highway and they are very anxious to have this supply protected against unscrupulous mineral claimants.

Please make every effort to have this area withdrawn at an early date.

Attachments
KMarshall:edy
cc: sent Southern

2/13/51.

U
Classification, R-10, Alaska
Withdrawals, E. O. 9337
Public Service Area
Whipple Creek, Tongass (S)

Director,
Bureau of Land Management,
Department of the Interior,
Washington, D. C.

Dear Mr. Clawson:

It has been determined that the following described area is needed as a Public Service area and it is recommended that you withdraw this area, subject to existing valid claims, from all forms of location and entry under the public land laws, including the U. S. Mining Laws, and except as herein provided, from leasing under the Mineral Leasing Act, in accordance with the authority vested in you by Executive Order No. 9337 of April 24, 1943, for the purpose of maintaining a public gravel deposit.

The said lands shall be subject to leasing under the mineral leasing laws for their oil and gas deposits, providing that no part of the surface of the lands shall be used in connection with prospecting, mining and removal of the oil and gas.

Whipple Creek Public Service Site
Tongass National Forest, Alaska

Description

Beginning at a point on the southeast boundary of U. S. Survey No. 2802 whence Corner No. 1 of U. S. Survey No. 2802 bears N. 30″ E., 220 feet, thence: N. 30″ E. 817 feet to Corner No. 6 of U. S. Survey No. 2803, thence: N. 46″ 30′ E. 860 feet; thence: S. 43″ 30′ E. 1080 feet, thence: S. 46″ 30′ E., 1160 feet, thence: S. 83″ 57′ W., 548 feet to PC + 57.4 on the S. E. edge of the right-of-way of the North Tongass Highway, thence: paralleling the center line of North Tongass Highway and 33 feet from the center line thereof in a southerly and westerly direction 353 feet, thence: N. 12″ W. 437 feet to point of beginning containing 37.5 acres, more or less.

2—Director, Bureau of Land Management.

The consent of the Department of Agriculture to this withdrawal is hereby given in accordance with a delegation of authority signed by Secretary of Agriculture Charles F. Brannan on December 16, 1949 (14 Fed. Reg. 7674).

Very sincerely yours,

LYLE F. WATTS,
Chief.

By /s/ C. M. GRANGER.

KMarshall:edy
cc: sent WO (4)
Southern 1

EXHIBIT B

5371

United States Department of Agriculture
Forest Service

Washington 25, D. C.

Address Reply to
Chief, Forest Service, and Refer to
U Classification
Withdrawals, Executive Order 9337
Recreation Areas (Administrative Sites)

December 16, 1949.

Circular No. U-220

Regional Foresters
and Director, Tropical Region

Dear Sir:

After study here and consultation with the Bureau of Land Management and the Solicitor's office, it has been decided that we should request the Bureau of Land Management to withdraw national forest administrative sites, public service areas, and other areas needed for public use under the provisions of Executive Order No. 9337 of April 24, 1943, in order to give these areas protection against subsequent mineral location.

The Solicitor of this Department believes that developed administrative sites and public service areas are protected against location and entry under the U. S. Mining Laws but is very doubtful whether buffer zones around such areas or potential but undeveloped areas are protected. The Bureau of Land Management has some doubts as to whether even a

developed area can be protected from mining claims unless withdrawn under Executive Order No. 9337 or by legislation. A recent court case in Oregon, which we lost, shows that the courts will uphold a valid mining claim which was located outside of, but right next to a developed recreation area. The judge would not recognize that the mining development interfered with the recreation use of the area, even though it was in plain sight of a camp spot.

Classification under Reg. U-3 (b) is undoubtedly useful, but there is considerable question as to whether it will stand a severe test, particularly if the area is undeveloped.

Withdrawal by the Bureau of Land Management under Executive Order No. 9337 gives unquestionable protection and it therefore seems unwise for us to rely on less assured methods to protect our administrative and public service sites.

Withdrawal under Executive Order No. 9337 will be desirable for administrative sites and public service areas on all national forest lands which are subject to location and entry under the U. S. Mining Laws. It will not be necessary or desirable on lands acquired under the Weeks law, lands subject to the provisions of the Weeks law, or other lands which for any reason are not subject to location and entry under the mining laws.

Regions should give priority to important administrative sites and public service areas which are in mineralized zones. Priority should also be given to important potential areas which are not yet

developed, since such areas are more vulnerable to adverse location than developed areas.

This procedure will replace the present classification procedure under Reg. U-3 (b). Areas already classified under Reg. U-3 (b) should be reported for withdrawal but might be placed in a lower priority than unclassified areas since the former already have some protection. On the other hands, since you have already classified your most important areas under U-3 (b), it would be well to reconsider each one as to priority, regardless of whether or not already classified.

Regions are requested to prepare requests for withdrawals for administrative sites and other areas as rapidly as other work permits. For the present, your requests should be sent to this office for transmittal to the Bureau of Land Management. Later on it may be desirable to send requests direct to the managers of the local District Land Offices.

For the present withdrawals will be requested only for areas used or to be used by the United States for governmental purposes or for public use.

Roadside zones are a borderline case. You are requested to study important roadside zones and if a withdrawal seems in the public interest, a request for withdrawal should be made, giving reasons why it is necessary and desirable. Description of the zone would probably have to be by reference to the center line of the highway survey, but description by legal subdivision would be preferable if it is practicable.

No attempt will be made to include special use

areas, but resorts or summer home groups which are within a large recreation area and are an integral part of that area may be included in the withdrawal of the recreation area.

Waterfront zones along lakes and streams of high recreation value which are needed for public use should be withdrawn, description should be by legal subdivision if possible; otherwise by metes and bounds.

The handling of a sizable recreation area such as Pinecrest, Priest Lake, Cottonwood, North Fork Shoshone, O'dell Lake, or Sandia Crest presents a problem. Such areas are primarily valuable for public recreation use and yet all of the area will not be actually needed. We are inclined to err on the side of including too much rather than to report on several separate tracts within the one recreation area. Good judgment is required here to save work and yet not overstep the bounds of propriety.

Withdrawals should be requested for the following types of areas:

1. Administrative sites—ranger stations, lookouts, guard stations, horse pastures, nurseries, warehouses, etc.
2. Public Service areas—camp and picnic areas, winter sports areas, organization camps, etc.
3. Other Areas—those which require protection for public use or government use, such as roadside and waterfront zones.

Areas needed for future development, as well as areas already developed, should be reported, but we must be reasonable and limit requests for with-

drawal of potential areas to those for which there is a foreseeable future need. The same principle applies to areas needed for expansion of existing areas.

A reasonable buffer zone should be included around the actually needed area, whenever this is necessary to protect the use to be made of the area.

Description of the area should, whenever possible, be by legal subdivision, generally to the nearest 10-acre tract in sections covered by General Land Office survey. In unsurveyed areas the approximate legal description as nearly as can be determined will be satisfactory. Metes and bounds descriptions may be used in unsurveyed sections but they must be tied to established corners, U. S. monuments, or easily recognizable landmarks. Two copies of a map must accompany requests for withdrawals described by metes and bounds survey.

It will not be necessary to justify the withdrawal by a report or to give a word description of the area and its use. The Bureau of Land Management will accept our statement that the area is needed for governmental or public use. The name of the area, the forest, the state and the legal description are all that is needed to support our recommendation for withdrawal.

The request to the Bureau of Land Management will accept our statement that the area is needed for form, including four extra thin white copies. One letter may be used to request withdrawal of several areas of the same type, but the withdrawal of administrative sites and public service areas should not be requested in the same letter.

Director,
Bureau of Land Management.

Dear Mr. Clawson:

It has been determined by the Forest Service that the following described area is needed as a (Public Service Area) (Administrative Site) and it is recommended that you withdraw this area, subject to existing valid claims, from all forms of location and entry under the public land laws, including the U. S. Mining Laws and from leasing under the Mineral Leasing Act, in accordance with the authority vested in you by Executive Order No. 9337 of April 24, 1943, for the purpose of maintaining a (public camp ground) (ranger station) (lookout) (winter sports area).

Red Rock Forest Camp, National Forest, Montana.
Sec. 1, S½; Sec. 12, N½; NW¼ SW¼, T. 43 N., R. 60 W. M.P.M.
Total area 680 acres.

The consent of the Department of Agriculture to this withdrawal is hereby given in accordance with a delegation of authority signed by Secretary of Agriculture Charles F. Brannan on December 16, 1949.

Very sincerely yours,
LYLE F. WATTS,
Chief.

It is realized that this procedure involves a lot of work, but the results will, we believe, fully justify

the effort since these areas will then be fully protected against mineral locations.

Once a withdrawal has been made it will no longer be necessary to maintain administrative sites and recreation area notice signs after the withdrawals are effective, but we should continue to post areas in mineralized zones for the information of prospectors. A new metal poster will be prepared for this purpose.

Even though we have the informal concurrence of the Bureau of Land Management to this procedure, there is always a possibility that any new procedure might strike a snag somewhere along the line, especially one like this which must clear Interior and Justice. There seems to be very little chance that administrative sites actually occupied and used could be questioned, and we do not foresee much opposition to actually developed and used recreation areas. When it comes to potential recreation areas or recreation areas covering a large area, of which only a small part is actually used or developed, then it is possible that objections might be raised.

In view of this uncertainty, we do not want regions to go to a lot of work before the procedure has been definitely established. It is therefore suggested that you start planning to get all your special areas withdrawn, but that each region send in only two or three proposals until you receive notice that the withdrawals are actually going through. It is quite probable that the first cases sent in will be rather closely examined, and your

initial proposals should therefore be average, run-of-the-mill recreation areas with a reasonable buffer zone and developed administrative sites. Undeveloped areas or roadside zones should be left for later on.

After you get notice that the procedure has been successfully established we hope that you will try to finish the entire job in the next three years.

Very sincerely yours,

LYLE F. WATTS,
Chief.

By C. W. GRANGE.

EXHIBIT C

Recreation

Recreation Areas and the General Policies Governing Their Designation and Use

NF-G3

Where planning indicates that recreation use should be dominant or co-dominant, it is generally desirable to establish definite recreation areas. The Forest Service recognized some 22 different types of recreation areas in this planning.

Recreation Areas—General

Reg. U-1. Wilderness Areas.

Upon recommendation of the Chief, Forest Service, National Forest lands in single tracts of not less than 100,000 acres may be designated by the Secretary as "wilderness areas," within which there shall be no roads or other provision for motor-

ized transportation, no commercial timber cutting, and no occupancy under special-use permit for hotels, stores, resorts, summer homes, organization camps, hunting and fishing lodges, or similar uses; provided, however, that where roads are necessary for ingress or egress to private property these may be allowed under appropriate conditions determined by the forest supervisor, and the boundary of the wilderness area shall thereupon be modified to exclude the portion affected by the road.

Grazing of domestic livestock, development of water storage projects which do not involve road construction, and improvements necessary for fire protection may be permitted subject to such restrictions as the Chief deems desirable. Within such designated wildernesses, the landing of airplanes on National Forest land or water and the use of motorboats on National Forest waters are prohibited, except where such use has already become well established or for administrative needs and emergencies.

Wilderness areas will not be modified or eliminated except by order of the Secretary. Notice of every proposed establishment, modification, or elimination will be published or publicly posted by the Forest Service for a period of at least 90 days prior to the approval of the contemplated order and if there is any demand for a public hearing, the regional forester shall hold such hearing and make full report thereon to the Chief of the Forest Service, who will submit it with his recommendations to the Secretary.

Reg. U-2. Wild Areas.

Suitable areas of National Forest land in single tracts of less than 100,000 acres but not less than 5,000 acres may be designated by the Chief, Forest Service, as "wild areas," which will be administered in the same manner as wilderness areas, with the same restrictions upon their use. The procedure for establishment, modification, or elimination of wild areas shall be as for wilderness areas, except that final action in each case will be by the Chief.

Reg. U-3. Recreation Areas.

Suitable areas of National Forest Land, other than wilderness or wild areas, which should be managed principally for recreation use may be given special classification as follows:

(a) Areas which should be managed principally for recreation use substantially in their natural condition and on which, in the discretion of the officer making the classification, certain other uses may or may not be permitted, may be approved and classified by the Chief of the Forest Service or by such officers as he may designate if the particular area is less than 100,000 acres. Areas of 100,000 acres or more will be approved and classified by the Secretary of Agriculture.

(b) Areas which should be managed for public recreation requiring development and substantial improvements may be given special classification as public recreation areas. Areas on single tracts of not more than 160 acres may be approved and classified by the Chief of the Forest Service or by

such officers as he may designate. Areas in excess of 160 acres will be classified by the Secretary of Agriculture. Classification hereunder may include areas used or selected to be used for development and maintenance as camp grounds, picnic grounds, organization camps, resorts, public service sites (such as for restaurants, filling stations, stores, horse and boat liveries, garages, and similar types of public service accommodations), bathing beaches, winter sports areas, lodges, and similar facilities and appurtenant structures needed by the public to enjoy the recreation resources of the National Forests. The boundaries of all areas so classified shall be clearly marked on the ground and notices of such classification shall be posted at conspicuous places thereon. Areas classified hereunder shall thereby be set apart and reserved for public recreation use and such classification shall constitute a formal closing of the area to any use or occupancy inconsistent with the classification.

Classification of Recreation Areas.

*The authority conferred upon the Chief by Reg. U-3 is hereby delegated to the regional foresters except that classification of Roadless and Virgin areas will be by the Chief. Regional foresters may redelegate to forest supervisors authority to classify recreation areas under Reg. U-3 (b).

*Reg. U-3 (b) affords the maximum protection against mineral location which the Secretary of Agriculture can give and classification thereunder

*Amended December, 1948.

is desirable for all recreation areas, developed or potential, which are in mineralized areas on National Forest lands withdrawn from the public domain.

Although development and use of an area as a recreation area or occupancy under special-use permit is considered superior to a subsequent mineral location, classification under Reg. U-3 (b) will strengthen that position, particularly in respect to scattered unoccupied portions of a large developed area.

Care must be exercised in classifying potential recreation areas under this regulation. To qualify as areas "selected to be used for development," areas must be in the advanced planning stage and must be on the program for immediate construction if funds were available. Unreasonable classifications would be detrimental and will be avoided.

Recommendations for classification of areas by the Secretary must include:

1. Name of area, Forest, State, county, legal description.

2. Map (scale 4 inc. = 1 mile or larger) showing: area boundaries, improvements and developments extant and proposed.

3. Short description of area, length of season, kinds of use and amount, cost of improvements, etc.

4. For potential areas: described need for area, estimated cost of development, estimated use, date construction is planned.

Posting Classified Areas.

Recreation areas classified under Reg. U-3 (b) will be described and shown on a map.

The following form of classification notice will be typed, printed or stamped on the map or firmly attached thereto:

1. Areas classified by the Secretary of Agriculture (over 160 acres).

"..... Recreation Area

"By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35), and the Act of February 1, 1905 (30 Stat. 628), and in accordance with Regulation U-3 (b) (Sec. 251.22, Chapter II, Title 36 CFR), of this Department this area, as shown by this map and legal description, is classified as the (name of area) Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"..... .

"Date

"....., .

"Secretary of Agriculture."

2. Areas classified by forest officers under delegated authority (under 160 acres).

"..... Recreation Area

"By virtue of the authority vested in me by Regu-

lation U-3 (b) (Sec. 251.22, Chapter II, Title 36 CFR) of the Secretary of Agriculture this area, as shown by the attached map and legal description, is classified as the (name of area) Recreation Areas and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"....

"Date

"....,

"Title."

Copies of the map and signed classification notice will be on file in the forest supervisor's office and such other places as designated by the regional forester.

All recreation areas classified under Reg. U-3 (b) will be conspicuously posted with "Classified Recreation Area" signs, Form 394-B. These signs will be posted at frequent intervals along the boundary of the area and at prominent places within the area, such as along routes of travel. The objective is to post the area in such a manner that any diligent person will know that it is classified. The wording of Form 394-B is:

"Clasified Recreation Area

"..... National Forest

"This area of National Forest land has been classified under Regulation U-3 (b) as a recreation area and is thereby set apart and reserved for public

recreation use and is closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"A map and description of the area so classified and the classification order are on file at the office of the Forest Supervisor of the above-named National Forest."

*Withdrawal of Recreation Areas by Public Land Order.

The withdrawal by public land order of lands used or needed for recreation purposes affords protection against mining claims. Public land order withdrawals are made by the Secretary of the Interior under the provisions of Executive Order No. 9337 with the recommendation of the Secretary of Agriculture. They must be cleared through the Budget Bureau and Attorney General's office and are not effective until published in the Federal Register. Pending preparation of the "Withdrawal and Classification" chapter of the Manual, field officers should be guided by Circular Letters U-220 and U-220-Supplement dated December 16, 1949, and March 1, 1950, respectively, unless superseded by subsequent instructions.*

Reg. U-5. Public Camp Grounds.

Public camp grounds established upon National Forest lands which are improved by the Forest Service, either from public funds or in cooperation

*Amended June, 1951.

with other public or private agencies, are for transient use by the public and shall not be occupied for extended periods or used for forms of occupancy which, in the opinion of the forest supervisor, are contrary to general public interest. The forest supervisor may, in his discretion, prohibit the occupancy of designated camp grounds by house trailers, the erection or use of unsightly and inappropriate structures or appurtenances, and may fix a maximum limit upon the number of consecutive days during which any person or group of persons may occupy a designated camp ground. Notice of such prohibitions or restrictions shall be given by a sign posted within said camp ground, and occupancy or use of the ground in violation of such prohibitions or restrictions is prohibited. Regulation L-19 is hereby revoked.

Management.

All recreation areas will be managed according to the management plans or objectives set up for them.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR TRANSMITTAL OF COPIES OF EXHIBITS OFFERED AND REFUSED AS PART OF THE RECORD ON APPEAL

State of Washington,
County of King—ss.

Donald McLellan Davidson, being first duly sworn, on oath deposes and says:

1. Exhibits A, B, and C annexed to defendant's motion for transmittal of exhibits filed herein on July 14, 1952, were prepared as follows:

(a) Exhibit A is a copy of a copy of the original exhibit. Stanley D. Baskin, attorney for plaintiff, during the course of the trial or just prior thereto, prepared a copy of the original and furnished it to defendant's attorney with the request that it be agreed that the copy could be offered in evidence in lieu of the original. Defendant so agreed. Plaintiff failed to offer the copy, and defendant then offered the copy which had been prepared by plaintiff.

(b) Exhibits B and C annexed to said motion are copies of copies of the original exhibits. The copies were furnished to defendant pursuant upon agreement made in open court after the originals had been offered in evidence and refused, and after plaintiff objected to their being marked for identification for purposes of incorporating them in the record on appeal. Exhibit A annexed hereto is the

letter of P. J. Gilmore, Jr., furnishing copies of Exhibits B and C to defendant.

2. All of the copies offered in evidence were either originals or copies prepared by plaintiff, and the copies annexed to defendant's motion were prepared from copies furnished by plaintiff.

3. The originals of such exhibits were at the time of trial in the possession of plaintiff's attorneys and were furnished to them by the United States Forest Service with offices in the same building as plaintiff's attorneys. Exhibits B and C are now, without question, available in the same building as plaintiff's attorneys.

4. Defendant is willing that the originals of the exhibits be transmitted in lieu of copies, but does not wish to burden the record with duplications of exhibits fully set forth in defendant's motion. Defendant is ready, willing and able to furnish the Court with the copies of Exhibits A, B and C prepared by plaintiff, but such copies would unnecessarily duplicate matters already in the record.

Wherefore, defendant submits that each of the following objections raised in plaintiff's motion for an order denying defendant's motion are frivolous.

(a) "The originals and not copies of said exhibits should be sent up to said Court of Appeals," because plaintiff agreed that copies could be offered in evidence, and because originals were offered at the trial and plaintiff delivered copies of such originals for use upon an appeal.

(b) "That this office does not have at its disposal all of the original exhibits to compare with the copies as set forth in defendant's said motion," because at least two of the three exhibits are available within the same building, and the third original exhibit was in plaintiff's possession at the time of trial and copies made by plaintiff for submission in lieu of the original.

(c) "It will be a burdensome and time consuming task to compare said copies with said original exhibits," because plaintiff has, or is able to furnish, the original exhibits, and has made and furnished copies to defendant, and has compared the originals with the copies.

Respectfully submitted,

/s/ DONALD McL. DAVIDSON,
Of Attorneys for Defendant.

Subscribed and sworn to before me this 14th day of August, 1952.

/s/ VIRGINIA H. BECK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed August 15, 1952.

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. F. SCHAUB,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 25th day of January, 1952, at 11:25 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for trial before the Court without a jury, the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Stanley Baskin, Assistant United States Attorney; the defendant appearing in person and by Wilfred C. Stump and Donald McL. Davidson, of his attorneys; and the following occurred:

Mr. Stump: Your Honor, at this time I would like to move the admission of Donald Davidson, who is a member of the State of New York Bar for the Second Circuit and also the Court of Claims. I have known Mr. Davidson for some time. He is presently with a Seattle firm, where he moved in the last year. I am also acquainted with his reputation and his integrity, and I would like to move his admission as co-counsel in this case. [1*]

The Court: Mr. Davidson may be associated

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

with you in connection with the trial of this case. Now, have the parties narrowed the issues any further, or the proof that will be presented here, by conferences between them since the pretrial conference in chambers?

Mr. Baskin: May it please the Court, we did have a conference, and there have been some answers to requests for admissions which have narrowed the factual issues some, and there will be an introduction of stipulation of some evidence perhaps that we will have to write up and submit to the Court in writing.

The Court: Can we go ahead with the hearing in view of the fact that this hasn't been reduced to writing?

Mr. Baskin: Yes, sir. I don't object to that.

The Court: Very well. You may proceed then.

Mr. Baskin: Does the Court wish us to make opening statements?

The Court: Yes.

Whereupon, opening statements were made by Mr. Baskin for the Government and by Mr. Stump and Mr. Davidson for the defendant; and thereafter, Court having reconvened at 2:00 o'clock p.m. on the 25th day of January, 1952, with all parties present as heretofore, the trial proceeded as follows:

The Court: You may proceed. [2]

Plaintiff's Case

Mr. Baskin: May it please the Court, I have several exhibits here I have filed with the Clerk I would like to introduce. Here is plaintiff's request

for defendant's admission as to proof of statements under Rule 36, the defendant's answers to the request, and then we have a second set of requests for admissions, and I believe they have answered that too. Yes, they have. You have no objection to certified copies? And I have, to introduce as an exhibit, certified copies of the Forest Service Manual issued February 1, 1926, pages Roman numeral three and then pages 57-L and 61-L, and Regulation Three of the Secretary of Agriculture of October 3, 1939.

The Court: You offer that as an exhibit?

Mr. Baskin: Yes, may it please the Court.

The Court: It may be admitted as Plaintiff's Exhibit No. 1.

PLAINTIFF'S EXHIBIT No. 1

United States of America,
Territory of Alaska.

I, B. Frank Heintzelman, Regional Forester, United States Forest Service, Department of Agriculture, Juneau, Alaska, do hereby certify:

That I am the legal custodian of records and files of the United States Forest Service, Juneau, Alaska, and I have compared the foregoing with our record copies of page III, pages 57-L and 61-L of the Forest Service Manual issued February 1, 1926, and in force September, 1940; and Regulation U-3 of the Secretary of Agriculture of October 3, 1939, of pages 40, GA-A3, Volume 1, Forest Service Manual amended October, 1939, and enforced

Plaintiff's Exhibit No. 1—(Continued)

during September, 1940, and have found the copies to be complete and true of the original regulations.

Dated this 18th day of January, 1952.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester, United States Forest Service,
Juneau, Alaska.

Subscribed and sworn to before me this 18th day of January, 1952.

[Seal] /s/ GEORGE J. HAEN,
Notary Public.

My commission expires Dec. 12, 1954.

(True Copy)

United States Department of Agriculture,
Office of the Secretary,
Washington, D. C.

By virtue of the authority vested in the Secretary of Agriculture by the Act of Congress of February 1, 1905 (33 Stat. 628), amendatory of the Act of Congress of June 4, 1897 (30 Stat. 11), I, William M. Jardine, Secretary of Agriculture, do make and publish the following regulations for the occupancy, use, protection, and administration of the national forests, the same to supersede all previous regulations for like purposes and to be in force and effect from the 1st day of July, 1926, and to constitute a part of the National Forest Manual. And the Forester is hereby authorized and

Plaintiff's Exhibit No. 1—(Continued)

directed to issue such instructions to the officers and employees of the Forest Service and to established such procedure for the guidance of the users of the national forests as may be necessary to carry these regulations into effect.

In testimony whereof I have hereunto set my hand and official seal at Washington, D. C., this 1st day of February, 1926.

[Seal] W. M. JARDINE,
Secretary of Agriculture.

United States Department of Agriculture
Forest Service

February 1, 1926.

Under authority from the Secretary of Agriculture, dated February 1, 1926, the following inscription and procedure are hereby issued and established for the guidance of the employees of the Forest Service and of the users of the national forests in carrying into effect the regulations of the Secretary of Agriculture.

W. B. GREELEY,
Forester.

(III)

Plaintiff's Exhibit No. 1—(Continued)

(True Copy)

April, 1929.

Reserve Sites

Reason for Reserving.

To insure the efficient administration, protection, improvement, and use of the national forests and their resources certain tracts must be retained in public ownership for strictly public uses. These include areas for headquarters stations, lookout stations, roads, telephone lines, pastures, planting and nursery sites, and for similar purposes needed in the work of Government officers charged with the administration, protection, and improvement of the forests. They include, also, areas essential to the use and disposal of national forest timber for mill sites, logging roads, banking grounds, chutes, etc., and areas necessary to the proper utilization of the forage resources of the forests, for watering places, lambing grounds, stock driveways, holding grounds, and the like. Recreational use of the forests is also recognized by law, and this requires the retention of camping grounds and similar places for the accommodation of the public. Likewise, tracts embracing watersheds from which the water supply of municipalities is taken should be retained for protection against contamination and pollution. While land classification has removed most of the danger that tracts valuable for public purposes will be listed, a continuation of the practice of reserving such tracts is desirable to emphasize their special values and to prevent impairment of those values

Plaintiff's Exhibit No. 1—(Continued)

by issuance of ill-considered permits. Their reservation also keeps constantly in view the specific purposes the tracts are adapted to and aids in formulating adequate and comprehensive administrative plans.

Kinds of Reserved Sites.

Two classes of reserved sites are recognized:

First, administrative sites, which include all areas reserved for the purpose of facilitating the ordinary administration, protection, and improvement of the forests by forest officers, such as ranger stations, summer pastures, lookout stations, and other similar purposes.

Second, public service sites, which embrace all areas needed for the proper utilization of national forest resources, such as camp grounds, water holes, mill sites, and like uses.

How Reserved.

The use or occupancy of a given tract of land for any of the above purposes is the most simple and effective form of reservation. Next to this is a formal dedication of the area to a specific use in the future by plans proposed and approved. Not all reserved areas are made a matter of formal record or posting. In a certain sense all national forest lands are reserved for public service purposes, and any area may be used for the purposes enumerated. Special reservation is necessary only where there may be some other demand for the land, and only areas which may possibly be later

Plaintiff's Exhibit No. 1—(Continued)

claimed or coveted for private purposes require the protection of a recorded dedication. Such special reservation is accomplished by use or dedication inside the forests, or use or Executive order outside the forests. In either case it should be made a matter of formal record.

(57-L)

(True Copy)

April, 1933.

Public-Service Sites

Tracts which must be retained under the control of the Government for sawmills, banking grounds, and other purposes incidental to the cutting, removal, or management of national-forest timber; for lambing grounds, watering places, driveways, etc., affecting the management of the grazing resources of the forests; for the protection of watersheds on which the water supply of municipalities depends; and for recreational and similar purposes, will, when necessary, be posted or selected as public-service sites. Areas so withheld are distinct from administrative sites reserved for the protection and proper administration of the forests.

The indiscriminate posting and selection of tracts having merely a conjectural value for public-service purposes is inadvisable. Land classified as non-agricultural is sufficiently protected by the classification for ordinary public-service purposes except when situated in a mineralized region. Hence, only

Plaintiff's Exhibit No. 1—(Continued)

those areas which have possible agricultural or mineral value, and are obviously very necessary in connection with the proper utilization of national forest resources, need be selected, posted, and recorded as public-service sites.

Tracts obviously needed for public-service purposes, but which, because of their situation in a mineralized region or some other reason, are liable to be located or claimed under any of the land laws of the United States applicable thereto, should be prominently posted by reserved-site notices, Form 263a, but formal survey and selection will not be made unless specially directed by the regional forester.

The general procedure prescribed for the selection, approval, and recording of administrative sites will apply to public-service sites, except that reserved-site notices, Form 263a, will be used for posting. Each selected tract will, after approval by the supervisor, be entered on the status record (Form 123) by outline in dark-green crayon and its designation shown in green ink. An index sheet similar to that for administrative sites will be provided in both the regional office and the supervisor's office and a separate "Public-service site" file will be kept in which the cases will be filed alphabetically. After the report has been approved by the regional forester, the tract will be crosshatched dark green on the status record.

No consideration will be given to public-service

Plaintiff's Exhibit No. 1—(Continued)

sites in the statistical report (Form 446) unless specially directed by the Forester.

Sanitation.

For instructions in regard to sanitation on either administrative sites or on public-service sites see Regulation P-4. "Protection of the public health," in the administrative section of the manual.

(61-L)

(True Copy)

Public-Service Sites

Tracts which must be retained under the control of the Government for sawmills, banking grounds, and other purposes incidental to the cutting, removal, or management of national-forest timber; for lambing grounds, watering places, driveways, etc., affecting the management of the grazing resources of the forests; for the protection of watersheds on which the water supply of municipalities depends; and for recreational and similar purposes, will, when necessary, be posted or selected as public-service sites. Areas so withheld are distinct from administrative sites reserved for the protection and proper administration of the forests.

The indiscriminate posting and selection of tracts having merely a conjectural value for public-service purposes is inadvisable. Land classified as non-agricultural is sufficiently protected by the classification for ordinary public-service purposes except when situated in a mineralized region. Hence, only those areas which have possible agricultural or

Plaintiff's Exhibit No. 1—(Continued)

mineral value, and are obviously very necessary in connection with the proper utilization of national forest resources, need be selected, posted, and recorded as public-service sites.

Tracts obviously needed for public-service purposes, but which, because of their situation in a mineralized region or some other reason, are liable to be located or claimed under any of the land laws of the United States applicable thereto, should be prominently posted by reserved-site notices, Form 263a, but formal survey and selection will not be made unless specially directed by the regional forester.

The general procedure prescribed for the selection, approval, and recording of administrative sites will apply to public-service sites, except that reserved-site notices, Form 263a, will be used for posting. Each selected tract will, after approval by the supervisor, be entered on the status record (Form 123) by outline in dark-green crayon and its designation shown in green ink. An index sheet similar to that for administrative sites will be provided in both the regional office and the supervisor's office and a separate "Public-service site" file will be kept in which the cases will be filed alphabetically. After the report has been approved by the regional forester, the tract will be crosshatched dark green on the status record.

No consideration will be given to public-service sites in the statistical report (Form 446) unless specially directed by the Forester.

Plaintiff's Exhibit No. 1—(Continued)

Sanitation.

For instructions in regard to sanitation on either administrative sites or on public-service sites see Regulation P-4. "Protection of the public health," in the administrative section of the manual.

(61-L)

Excerpt From Page (40), GA-A3, Volume I,
Forest Service Manual
*Amended October, 1939.

*Land Uses

*Recreation Areas

*Reg. U-3. Suitable areas of national forest land other than wilderness or wild areas which should be managed principally for recreation use but on which certain other uses may or may not be permitted may be given special classification. Areas in excess of 100,000 acres will be approved by the Secretary of Agriculture; areas of less than 100,000 acres may be approved by the Chief, Forest Service, or by such officers as he may designate. (Revised Oct. 3, 1939).

Receipt of copy acknowledged.

Received in evidence January 25, 1952.

Mr. Baskin: And then I offer, as Exhibit No. 2, certified copies of the Forest Service Regulations U-10 and U-11.

Clerk of Court: That will be Plaintiff's Exhibit No. 2.

PLAINTIFF'S EXHIBIT No. 2

United States of America,
Territory of Alaska—ss.

I, B. Frank Heintzleman, Regional Forester, United States Forest Service, Department of Agriculture, Juneau, Alaska, do hereby certify:

That I am the legal custodian of records and files of the United States Forest Service, Juneau, Alaska, and I have compared the foregoing with our record copies of Regulations U-10 and U-11 of the Secretary of Agriculture pertaining to administration of United States Forest Service and the Chief Forester's delegation of authority to the Regional Forester, Sections NF-H5, pages 1 to 2, and NF-H5, pages 1 to 4, Volume 3 of the National Forest Manual, and have found the copies to be complete and true of the original regulations.

Dated this 18th day of January, 1952.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester, United States Forest Service,
Juneau, Alaska.

Subscribed and sworn to before me this 18th day of January, 1952.

[Seal] /s/ GEORGE J. HAEN,
Notary Public.

My commission expires Dec. 12, 1954.

Plaintiff's Exhibit No. 2—(Continued)

(Copy)

Special Land Uses

NF-H5

Basic Regulation, Requirements, and Limitations

*Reg. U-10. Special use permits, Archaeological Permits, Leases, and Easements; General Conditions. All uses of National Forest Lands, improvements, and resources, including the uses authorized by the Act of March 4, 1915 (38 Stat. 1101; 16 U.S.C. 497), and the Act of March 30, 1948 (Public Law 465, 80th Cong.; 62 Stat. 100), and excepting those provided for in the Regulations governing the disposal of timber and the grazing of livestock or specifically authorized by Acts of Congress, shall be designated "Special Uses," and shall be authorized by "Special Use Permits."

The temporary use or occupancy of National Forest Lands by individuals for camping, picnicking, hiking, fishing, hunting, riding, and similar purposes, may be allowed without a special use permit; provided, permits may be required for such uses when in the judgment of the Chief of the Forest Service the public interest or the protection of the National Forest requires the issuance of permits.

Special use permits shall be issued by the Chief of the Forest Service or, upon authorization from him, by the Regional Forester, Forest Supervisor,

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

or Forest Ranger, except as herein provided, and shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the Regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.

Special use permittees shall comply with all State and Federal Laws and all Regulations of the Secretary of Agriculture relating to the National Forests and shall conduct themselves in an orderly manner.

A special use permit may be terminated with the consent of the permittee, or because of nonpayment of fees, by the officer by whom it was issued or his successor, but may be revoked or canceled only by the Secretary of Agriculture or by an officer of the Forest Service superior in rank to the one by whom it was issued, except that a term permit may be revoked only for breach of its terms or violation of law or regulation. Appeals from action relating to special use permits may be made, as provided in Sec. 211.2 (Reg. A-10) of this Chapter.

A special use permit may be transferred with the approval of the issuing Forest Officer, his successor or superior.

Special use permits authorizing the operation of public service enterprises, such as hotels and resorts, shall require that the permittee charge reasonable rates and furnish such services as may be necessary in the public interest.

The Chief of the Forest Service is also authorized

Plaintiff's Exhibit No. 2—(Continued)

to issue permits, execute leases, and grant easements as follows:

Permits under the Act of June 8, 1906, (34 Stat. 225; 16 U.S.C. 431, 432), for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity in conformity with the uniform rules and regulations prescribed by the Secretaries of the Interior, Agriculture, and War, December 28, 1906. (43 CFR 3.1 to 3.17.)

Leases of land under the Act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), in such form and containing such terms, stipulations, conditions and agreements as may be required in the public interest.

Easements for rights-of-way for telephone and telegraph lines under the provisions of the Act of March 4, 1911 (36 Stat. 1253; 16 U.S.C. 420), subject to such payments as may be equitable and to such stipulations as may be required for the protection and administration of the National Forests.

Nothing herein shall be construed to prohibit the temporary occupancy of National Forest lands without permit for the protection of life or property in emergencies, provided a special use permit for such use be obtained at the earliest opportunity.

*Note: The Act of March 30, 1948, applies to Alaska only.

Delegation of Authority.

*The authority to issue special use permits conferred upon the Chief in Reg. U-10 and subsequent

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

regulations except Reg. U-18 is hereby delegated to the regional foresters subject to the restrictions set forth in the Manual on summer homes, ski lifts, resorts, roadside zones, and dams. Regional foresters may delegate this authority subject to the following restrictions:

1. The authority to grant permits under Reg. U-14 will not be delegated except as specifically provided in the regulation.

2. The granting of permits under Reg. U-17 will not be delegated.

3. Term permits may be issued only by the regional forester or other officers to whom he may delegate this authority by special letter.

4. Airfield permits will be issued only by the regional forester.

*Authority to issue permits under the Acts of June 8, 1906 (Archaeological Explorations), and February 28, 1899 (Mineral Springs), and to grant telephone and telegraph line right-of-way easements under the Act of March 4, 1911, is reserved to the Chief.

*The authority to authorize the issuance of special use permits on experimental forests and ranges is delegated to regional foresters subject to Manual restrictions applicable to National Forest lands and provided that the approval of the station director is obtained.

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)
(Copy)

Special Land Uses Noncharge Permits

NF-H5-1

Free Special Use Permits.

Reg. U-11. Free Special Use Permits. The Chief of the Forest Service may authorize the issuance of special use permits without charge when the use is (1) By a Governmental agency, (2) of a public or semi-public nature, (3) for noncommercial purposes, (4) in connection with an authorized utilization of national forest resources, (5) of benefit to the Government in the administration of the national forests, or for similar purposes compatible with the public interest, and when authorized and directed so to be issued by Acts of Congress.

Intent of Regulation.

Reg. U-11 both authorizes and limits free use of National Forest lands, resources, and improvements under certain specified conditions. The granting of free use is not permissible unless the use comes within the letter and intent of the regulation.

Classes of Special Use Permits Which May Be Issued Without Charge.

Regional foresters are authorized to issue free special use permits or may delegate this authority, for the following uses. Classes of uses which are not specifically mentioned in the following tabulation may not be granted free without prior approval of the Chief.

Plaintiff's Exhibit No. 2—(Continued)

*A. Uses by any department or branch of the Federal or State Governments, including municipalities, when no profit is to be derived from said uses; and co-operatives sponsored by the United States, such as REA.

(A Government agency would not be entitled to free use for a concession charging commercial rates, the profits of which went into the general fund for expenditures elsewhere.)

B. Cemeteries, churches, and public schools for settlers residing within the exterior boundaries of the forest, or in the vicinity thereof.

C. Uses of lands for public purposes under the sponsorship and management of associations or organizations which will make desirable forms or types of service or facilities available to the general public without requirements of membership or any form of class differentiation and without charge other than necessary and equitable to repay the reasonable cost of operation and maintenance or of special services or facilities furnished to individuals using the area.

D. Cabins for the use of miners, prospectors, trappers of predatory animals, stockmen in connection with grazing permits, and other permittees for temporary use in connection with authorized uses.

(Cabins used during the entire year as headquarters shall be classified as residences and charged

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

for. The need for the use must be primarily for the purpose specified. A stockman should not be allowed free use for the cow camp which is used primarily for summer home purposes.)

*E. Range facilities, i.e., (1) enclosures created by pasture, allotment boundary, drift, and division fences and the natural features to which they may be tied, and (2) corrals, dipping-vats, tanks or wells or pipelines to supply water for livestock, shipping pens, livestock driveways, structures for the housing of range supplies, riders or herders, etc., where the basic occupancy of the lands and use of the forage resources by the livestock to be served is (a) compensated for by annual payment of the prescribed grazing fees, or (b) authorized without charge under the provisions of Reg. G-3 (b) or Reg. U-15.

*Range facilities which are fully justified from a range management standpoint may be granted free; others must be on a charge basis. See Range Facilities, NF-H5-2; also Reg. G-9(a), NF-C9(1) and C9-2(1) and (2).

*Range facilities granted under free use must:

1. Contribute materially to proper management and administration of the range.

2. Be available for use (but not necessarily used) by other authorized grazing permittees.

F. Logging railroads, roads, flumes, tramways,

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

enclosures, sawmills, kilns, and other improvements necessary to the manufacture of lumber or other products from timber obtained principally from the National Forests.

(Improvements of this nature may be authorized by appropriate clauses in timber sale agreements or permits, without charge, during the period of use, if needed for the utilization of National Forest timber.)

G. Conduits, dams, reservoirs, pumping stations, or any other water development projects for municipal, domestic, irrigation, mining, railroad, livestock watering, or other purpose of public value.

(Where the use of watersheds involves special forms of administration or utilization of forest products, specific agreements with equitable provisions for compensation will be required.)

H. Telephone lines with free use or free connections by Forest Service. Telegraph lines with free use of poles for attaching thereon of Forest Service lines. Power lines as stipulated under Rental Charges, NF-F2-3.

(Telephone and telegraph lines will be permitted without charge only if there is a reasonable probability that the Government will avail itself of the preferential service or the right to attach lines. Free use would not be warranted if there were no probability that the Government would ever need the reciprocal privileges.)

Plaintiff's Exhibit No. 2—(Continued)

I. Roads and trails which are free public highways, and airports and air navigation facilities which are open to the free use of the public.

J. Stone, earth, clay, gravel, marl, sod and similar materials used for projects constructed under permits, or for the construction or maintenance of public roads and trails, or by bona fide settlers, miners and prospectors for buildings or soil improvement purposes.

(Material of this kind will not be permitted free to contractors if the terms of the contract require the contractor to furnish all materials, since in such cases the contractor has figured the expense of purchasing material and to grant free use would be inconsistent with the purpose of this regulation.)

K. Fish hatcheries of a noncommercial nature.

L. Campfire or other permits for temporary use or occupancy, when required, as defined by Reg. U-10.

M. Sewage systems.

N. Signs.

O. Occupancy of Forest Service buildings at times when the buildings would otherwise be vacant and when such occupancy would afford protection to them. Forest Service structures located outside the national forests are not subject to the special use procedure. (See NFH3 (6) and (7). "Lands

Plaintiff's Exhibit No. 2—(Continued)

Without National Forest Status" and "Lands Not Subject to Special Uses.")

(Free use will be allowed only when it can definitely be shown that the occupancy of the Government building is of definite advantage to the Forest Service or in the case of temporary per diem employees whose periods of employment are unpredictable where it is to the advantage of the Government to have them continue living in Government quarters so that they may be available on short notice to resume employment. This provision is particularly applicable to lookouts and forest guards.)

P. Former Owners. In the acquisition of lands for forestry purposes it not infrequently happens that prospective vendors are elderly people who are willing to sell their holdings provided they may be allowed to remain on the premises during their lives without charge, occupying such habitation as may be on the land and using a few acres surrounding the same. Assurance that this request will be granted is helpful in carrying on acquisition work and often an advantage to the Government. As the preferable alternative to the reservation of the right of use as a stipulation in the conveyance of title to the United States, free special use permits may be granted to the former owners in such cases for the period of their lives.

Q. Persons Residing Upon Land at the Time of Purchase. In a number of instances there are per-

Plaintiff's Exhibit No. 2—(Continued)

sons residing upon, but not the owners of, lands acquired by the United States for forestry purposes. Such occupants are often totally without financial resources of any kind and unable to advance even the modest fees charged under existing regulations for agricultural and residential use of national forest land. Their only means of subsistence other than relief being continued cultivation of the land, their eviction from the premises would result in increased suffering and an additional relief burden.

Free special use permits may be issued in those deserving cases in which the permittee agrees:

(1) That in order to conserve the fertility of the soil and prevent erosion, he will employ only such methods of cultivation as may be approved by the County Agent or the forest officer in charge.

(2) That he will, without charge, give his services in the suppression of such forest fires as may occur in the vicinity of the land occupied by him.

(3) That he will maintain the dwelling and other improvements including fences and terraces in a manner satisfactory to the forest officer in charge.

The issuance of such free use permits shall be limited:

(1) To persons actually resident upon the lands at the time of acquisition who are, upon investigation, found to be unable to pay the usual fees.

Plaintiff's Exhibit No. 2—(Continued)

(2) To lands of such quality and topography as will allow cultivation without material damage by erosion.

(3) To lands having a habitable dwelling.

R. Parcelero System in Puerto Rico. Under what is known as the Parcelero System in Puerto Rico, free special use permits for cultivation and residence in deserving cases may be issued, if the land is of such quality and topography as will permit cultivation without material damage by erosion—and if the permittees agree to plant to forest trees certain portions of their parcels and tend such plantations as required by forest officers in charge. In the tropics it is often practicable to grow food crops between rows of planted trees and thereby afford the trees the cultivation necessary to their satisfactory development.

S. Motion Pictures. When the use is of a temporary character and does not involve any physical changes in the land or damage to resources or structural occupancy. (See also, Motion Pictures, NF-H5-2.)

Procedure.

The uses authorized above will be permitted without charge when used for the purpose or in the manner specified. Permits will include the usual stipulations in regard to protection of national forest interests and will provide that the permit will terminate if the permittee does not use the premises as contemplated by Reg. U-11.

Plaintiff's Exhibit No. 2—(Continued)

Application, survey maps, issuance of permits, etc., will be handled the same as for other special use permits.

Free special use permits shall be issued with one "original," one "duplicate," and one "ranger's copy," promptly upon the approval of the application. Section 1 of Form 832, if used, shall be deleted and in its place shall appear "Issued free of charge under authority of Reg. U-11 (*)."

*(Insert in blank space the instruction under Reg. U-11 which is applicable.)

Receipt of copy acknowledged.

Received in evidence January 25, 1952.

Mr. Baskin: May it please the Court, there was a matter of amending our complaint to correctly state a regulation. Paragraph Four of our complaint, I would like to move to amend the last sentence by striking the words or the [3] figures and letters "36 CFR 251.22" and adding "an order of the Secretary of Agriculture dated February 1, 1926, and regulations of the National Forest Manual, pages 57-L and 61-L."

The Court: You better read that over again so I can make the amendment by interlineation. "An order of——

Mr. Baskin: "An order of the Secretary of Agriculture dated February 1, 1926, and regula-

tions of the National Forest Manual, pages 57-L and 61-L."

The Court: That is the pages?

Mr. Baskin: Those are the page numbers; yes.

The Court: 57-L and——

Mr. Baskin: And 61-L.

The Court: Well, the amendment is allowed.

CHESTER M. ARCHBOLD

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Chester A. Archbold.

Q. Where do you live, Mr. Archbold?

A. Ketchikan, Alaska.

Q. Who are you employed by?

A. United States Forest Service, Department of Agriculture. [4]

Q. How long have you been employed by the Forest Service? A. Since July 1, 1924.

Q. And where are you stationed at the present time? A. At Ketchikan, Alaska.

Q. How long have you been stationed at Ketchikan? A. Since September of 1931.

Q. Now, what is your official title, and briefly state what your duties are?

A. My title is Division Supervisor of the Southern Division of the Tongass National Forest, and I have to do with operating the Southern Division

(Testimony of Chester A. Archbold)

according to the policies and standards set up in the National Forest Manual.

Q. And is that under the supervision of the Regional Forester here in Juneau, Alaska?

A. It is. It comes under the Regional Forester here at Juneau, Alaska.

Q. Mr. Archbold, are you acquainted with the thirty-seven and a half acres of land which has been withdrawn for the use of the Bureau of Public Roads? A. I am.

Q. Where is that land located?

A. It is located slightly beyond Mile 12 on North Tongass Highway at the point known as Whipple Creek.

Q. What island is that on?

A. It is on Revillagigedo Island. [5]

Q. That is north of Ketchikan, Alaska?

A. It is.

Q. Mr. Archbold, when to your knowledge was the first removal of gravel from that Whipple Creek area?

A. At the time the extension of North Tongass Highway went past Whipple Creek the Bureau of Public Roads removed gravel from above the bridge and below the bridge to make the approaches to the bridge there.

Q. What year was that?

A. During the year of 1934, as I recall it.

The Court: '34, you say?

A. 1934; yes.

Q. (By Mr. Baskin): You are familiar with

(Testimony of Chester A. Archbold)

the thirty-seven acres that were withdrawn, are you not? A. I am.

Q. And doesn't—I am speaking of the thirty-seven and a half acres that was withdrawn by the Public Land Order—734, I believe.

The Court: Well, maybe we can shorten this up if you just state the tract involved in this controversy.

Mr. Baskin: Very well.

A. I am acquainted with that; yes, sir.

Q. (By Mr. Baskin): Are you acquainted with the tract of land or the area which the defendant claims that overlaps onto the Government's thirty-seven acres? [6]

A. I am acquainted with that also.

Q. Now, in 1934, did the Bureau of Public Roads remove sand and gravel from that part of the land that is claimed by the defendant?

A. They removed gravel from probably fifty to seventy-five feet within this claim.

Q. And would that be the claim, the end of the claim, that is nearest the road?

A. The lower extremities of the claim; yes, sir.

The Court: When you speak of the claim, you are speaking of the defendant's claim?

A. That is right.

Q. (By Mr. Baskin): Now, has the Forest Service done anything in the way of preparing that thirty-seven acres or part of that thirty-seven acres for a public service site? A. We have.

(Testimony of Chester A. Archbold)

Q. Tell the Court just what they did in connection with that?

A. In the year about 1935 the Regional Forester looked the area over with the idea of planning for recreational purposes there. It didn't get into much beyond the planning stage until about 1940 when we surveyed the area, posted it as a public service site, ninety-one and thirteen-hundredths acres at that time, and that was accomplished by my ranger, A. W. Hodgman, on August 12 to 16, 1940. That plan was approved by the Regional Forester [7]—the Assistant Regional Forester—on September 11, 1940. By a letter dated August 6, 1940, an allotment request for Civilian Conservation Corps labor was approved for a limited amount of brushing and clearing on the area. By another letter dated September 4, 1940, I advised the Regional Office that fifty Civilian Conservation Corps men were working on the area. The work completed then was in brushing out trails, clearing out underbrush for a picnic area, cutting up windfalls for firewood, and cutting out several trails, one on each side of the creek running up into the area and into this mining claim. There were over five hundred man-days of Civilian Conservation Corps work reported at that time.

Q. Now, are you familiar with where that work was performed by those Civilian Conservation Corps men? A. I was.

Q. Tell the Court where that work was done.

A. It was done within the, along both banks of

(Testimony of Chester A. Archbold)

Whipple Creek and extending in a northeasterly direction about eight to nine hundred feet on both sides of the creek.

Q. And was that a part of the area that the defendant now claims?

A. That goes within that area.

Q. Now, were there any claims ever filed against this, the land on both sides of Whipple Creek? [8]

Mr. Stump: May it please the Court, I wondered about the materiality of another claim.

The Court: You asked whether there were other claims?

Mr. Baskin: Yes. I asked if there were any other claims that were filed on the area that the defendant now claims.

Mr. Stump: I question the materiality, your Honor. In his opening statement he said a gold mineral claim was filed but that it was decided that there was no discovery. It wouldn't be material to this.

The Court: Do you claim any materiality for this?

Mr. Baskin: May it please the Court, I am claiming, the relevancy is this, that the Forest Service protested that claim for the purpose of protecting this area for the use as a public service site and that through their protest it was finally decided by the Commissioner of the General Public Land Office that his claim was not valid. I am showing that the efforts on the part of the plaintiff to protect this area as a public service site——

(Testimony of Chester A. Archbold)

The Court: Well, you can ask him that without bringing out the facts of the location of claims unless your claim that the Forest Service has always attempted to exercise exclusive control over this area is challenged or any effort is made to discredit it when you [9] could bring in this evidence, you are now trying to bring in, by way of rebuttal. In other words, for your prima-facie case all you need to do is show that the Forest Service, if that is a fact, exercised or attempted to exercise and claim the right of exclusive control over this area.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Now, Mr. Archbold, was gravel ever removed from that area, after the Civilian Conservation Corps performed that work on it, for the purpose of building roads by any agencies of the Government? A. There was.

Q. All right. What year was gravel removed from there?

A. During 1942 the United States Coast Guard completed a small road project of about two thousand feet in length at their Point Higgins Radio Station, and gravel and rock was taken from Whipple Creek to build that road.

Q. Did the Forest Service consent for the Coast Guard to remove that gravel for that purpose?

A. We did.

Q. And tell the Court where that gravel was removed from.

A. The gravel was removed from above and below the Whipple Creek Bridge and extended up

(Testimony of Chester A. Archbold)

into the present claim fifty to one hundred feet in the stream bed.

Q. And when you say the "present claim," are you speaking of the defendant's claim? [10]

A. Yes, the defendant's claim; the one in the case.

Q. Do you know about how much gravel was removed from his claim?

A. I could not say. I would imagine probably as much as three or four hundred yards of the total, cubic yards.

Q. Now, does the Forest Service engage in the construction of roads in Southeastern Alaska?

A. It does; minor roads under the forest road development program.

Q. And on Revillagigedo Island has the Forest Service constructed any roads?

A. On our minor roads system down there we have about eleven miles of minor roads in addition to the Tongass Highway.

Q. Did the Forest Service construct the Tongass Highway?

A. We did not. It is a forest highway constructed from forest highway funds by the Bureau of Public Roads and maintained by the Bureau of Public Roads.

Q. But the Forest Service pays the Bureau of Public Roads to build and maintain the road, is that correct?

A. Under the present system the allotment is

(Testimony of Chester A. Archbold)

set up to them rather than to us, appropriated for them.

Q. When was the present allotment system changed? Was it ever any different than what it is now? In other words, did you formerly pay them to build and maintain the Tongass Highway? [11]

A. Well, it didn't work that way.

Q. Well, tell the Court just how it did work then.

A. The Bureau of Public Roads used to be within the Department of Agriculture years ago, and it has been changed from one agency to another. It is now under the Department of Commerce, and the appropriation is set up by Congress directly to the Department of Commerce now.

Q. But when the Tongass Highway was built, was that paid for by Forest Service funds?

A. It was paid from the forest highway funds; yes.

Q. And in addition to the Tongass Highway, how many miles of road does the Forest Service have in that vicinity?

A. We have approximately eleven miles of minor roads in and around Ketchikan.

Q. Now, has the Forest Service by its own employees removed gravel from the defendant's claim for the purpose of constructing roads?

A. You mean with our own equipment?

Q. With your own equipment and your own employees? A. No, we have not.

Q. Well, how has that gravel been removed?

(Testimony of Chester A. Archbold)

A. The gravel has been removed by contract. We have been contracting since 1948, putting the bids out on a competitive basis and going to the lowest bidder.

Q. But you pay for that out of the Forest Service funds? [12] A. That is right.

Q. Now, have you had any contracts, have you let any contracts for the purpose of constructing roads in that vicinity?

A. We have. We have let three or four major contracts.

Q. When was your first one?

A. On July 27, 1948, Berg Construction Company was awarded a contract, No. 810 FS 815. They removed 15,369 cubic yards of borrow fill and surfacing for the South Point Higgins Road during 1948 and 1949.

Q. Well, how much was the total cost of that contract construction job?

A. The total cost for that was——

Mr. Stump: May it please the Court, I don't wish to object all the time, but the cost of that contract is not relevant.

The Court: I don't see the materiality of it either.

Mr. Davidson: The contract would speak for itself.

The Court: What I wonder about is about the admissibility of it at all. What do you claim for evidence of jobs of this kind?

(Testimony of Chester A. Archbold)

Mr. Baskin: Well, I am claiming, may it please the Court, that——

The Court: I mean, on a hearing for preliminary [13] injunction it would all be very relevant, but why is it relevant now?

Mr. Baskin: To show removal of gravel for the purpose of constructing roads. Actually, the contract, I will agree, isn't relevant, but all I am endeavoring to show is the removal of the gravel, may it please the Court.

The Court: For the purpose of showing what, proving what?

Mr. Baskin: That the Government has used this area as a site for the removal of sand and gravel in constructing Forest Service roads.

The Court: Why do you have to go that far back? He claims here under a purported location in June, 1951. Why don't you limit the evidence to a reasonable period antedating his claimed location?

Mr. Baskin: I am endeavoring to show, may it please the Court, I think that it is material and that we should show all of the acts of the Government in appropriating this land, and I think that, commencing back at least in 1948 when they let contracts for the construction of roads and removal of that gravel, that that is pertinent now; that antedates the defendant's claim.

The Court: Well, you don't have to show all that in order to dispute his claim. All you need to show is an appropriation or use or possession of

(Testimony of Chester A. Archbold)

this area at the time [14] he went in and made his location.

Mr. Baskin: Well, this is the whole point. I am showing all of the removal of the gravel as part of the possession.

The Court: But possession in 1948 is immaterial. It is the possession at the time of his location.

Mr. Baskin: Or prior to that time.

The Court: Well, within a reasonable time, as I said. But it wouldn't extend for years back. That is getting to be too remote.

Mr. Baskin: Well, but, may it please the Court, we have alleged in paragraph seven that the Government had appropriated this land by removing the sand and gravel, prospecting, and so forth, and this is a part of those acts of appropriation. While we allege that it was also appropriated in 1940, we have also alleged in the alternative that it was appropriated by acts of removing the gravel, and that is just what I am endeavoring to show here. Now, at the time, whenever it was appropriated, that is when it ceased to be open for the mineral entry of the defendant.

The Court: Well, it makes no difference whether it was open or not in 1948. The only question is whether it was open to mineral location at the time he made his location. In other words, you are not trying to prove every link in a chain of title here, or anything like that, so that you have [15] to go back all these years. You can show in a general

(Testimony of Chester A. Archbold)

way, for instance, that they used the tract of land or what they did there just in a general way, but to go into specific accounts of contracts and all that, why, it is just immaterial. You don't have to show that in order to maintain your contentions here.

Mr. Baskin: But, if that is a part of our proof of the possession, why, we have to show that.

The Court: But you don't have to go back three years to show possession. It is possession at the time or immediately preceding the time of the location that is material here, not anything three years back. You don't have to go back that far. The Government isn't under any burden here to show continuity of possession.

Mr. Baskin: But, if the land was appropriated in 1948 for the purpose of building roads, then it ceased at that time to become open for purposes of filing mineral claims.

The Court: You can show that, as I say, in a general way by showing it was appropriated and used, but you don't have to bolster it up by showing how it was appropriated and used. That is a matter for cross-examination.

Mr. Baskin: Very well.

The Court: Of course even then evidence of appropriation in 1948 is immaterial unless you can show continuity.

Mr. Baskin: Well, may it please the Court, I am [16] planning to bring it right up to date with

(Testimony of Chester A. Archbold)

other contracts, showing other contracts subsequent to 1948.

The Court: You may do that in a general way, but there is no use of cross-examining your own witness. Leave that up to your opponent.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): In 1948 then one of the contractors for the Forest Service did remove, I believe you said, about 15,369 cubic yards of gravel?

A. That is right.

Q. And was that in the area now claimed by the defendant?

A. That was all in the area claimed by the defendant.

Q. Did any other contractors for the Forest Service remove sand and gravel from the area claimed by the defendant?

A. There were three other claims or contracts: Almquist's contract on October 25, 1949; Berg again on June 28, 1950.

Q. How much gravel did Mr. Almquist remove?

A. He removed 6,654 yards.

Q. How much gravel did Mr. Berg remove?

A. 8,215.

Q. And when did Mr. Berg perform his contract? Do you remember the period of time covered by his removal of the sand and gravel?

A. The last one?

Q. Yes. [17]

A. Starting June 28, 1950, and continuing on through into December of 1950.

(Testimony of Chester A. Archbold)

Q. Now, in addition to those contracts did anybody else remove gravel out there under the contract with the Forest Service?

A. Thomas Construction Company, during 1949 and 1950.

Q. How much did that company remove?

A. A total of 900 cubic yards.

Q. Now, was all of the gravel removed by Mr. Almquist and Berg Construction Company and the Thomas Construction Company removed from the area claimed by the defendant?

A. That is right.

Q. Those contracts you mentioned, state whether or not those were with the Forest Service and whether they were for construction of Forest Service roads.

A. They were entirely for construction of minor roads by the Forest Service.

Q. Do you know whether or not the Bureau of Public Roads removed any gravel from the area claimed by the defendant while your contractors were removing gravel from that area?

A. They did. They obtained gravel from Whipple Creek Pit during the time that our contractors were working.

Q. That would be then between 1948 and December, 1950? A. That is right. [18]

Q. Do you know about how much they removed from the area claimed by the defendant?

A. I have no figures for that. It would be just

(Testimony of Chester A. Archbold)

an estimate—between twenty-five hundred and three thousand yards or more.

Q. Are you—strike that. Did the Bureau of Public Roads ever request the Forest Service to set any land in the vicinity of Whipple Creek aside for their use in constructing highways?

A. They did.

Q. When did they first, or when did they first, may I say, formally approach the Forest Service by letter; do you know?

The Court: Well, I think it is not when they first approached the Forest Service, but what did the Forest Service do?

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Do you—state whether or not on or about January 31, 1951, the Bureau of Public Roads filed with the Forest Service a request for setting the land aside, the thirty-seven acres of land aside, for use of the Bureau of Public Roads?

A. The Forest Service received such a letter on that date; yes.

Q. Did they receive a map which showed the boundaries of [19] that thirty-seven and a half acres of land? A. They did.

Q. Now, what did the Forest Service do in connection with setting that land aside?

The Court: Well, it isn't all the details that they might have gone to to set it aside. Just ask him, did the Forest Service set it aside.

Mr. Baskin: Very well.

(Testimony of Chester A. Archbold)

Q. (By Mr. Baskin): Did the Forest Service set that thirty-seven and a half acres of land aside for the use of the Bureau of Public Roads?

A. We did.

Q. And what was the purpose of setting that land aside for their use?

A. To obtain a supply of road-building materials for construction and maintenance of forest highways and forest road development projects.

Q. Now, when did they do that? When did the Forest Service do that, or when did the Forest Service set that land aside?

A. On February 9, 1951, by Correction Memorandum No. 11.

Mr. Stump: If the Court please, I don't wish to object, but we have agreed on the letters. They can be admitted and they speak for themselves, but we have agreed to the letters. [20]

The Court: Well, you shouldn't duplicate by oral testimony anything that is already agreed or stipulated to. Just put it in evidence; that is all.

Mr. Baskin: Very well.

The Court: The facts to which you have agreed or which have been stipulated, are they embodied in any writing?

Mr. Baskin: Only in requests for admissions and their answers, and I think this one has.

Mr. Davidson: The letters we agreed to.

The Court: Well, are they a part of the record at the present time?

Mr. Davidson: They are not.

(Testimony of Chester A. Archbold)

Mr. Baskin: My understanding is that you have admitted that the Forest Service set the land aside; did you not?

Mr. Davidson: The Forest Service issued a Correction Memorandum.

Mr. Baskin: Very well. We have filed in the proceedings of this case in connection with the preliminary injunction a certified copy of the Correction Memorandum dated February 9, 1951, and I offer that as an exhibit, may it please the Court. It is in the file of this case already.

The Court: Well, you mean that is something that, although it is in the file, you cannot agree upon?

Mr. Stump: We have agreed on it. [21]

Mr. Davidson: We have agreed on it.

Mr. Baskin: I am offering it as evidence at this time.

The Court: If you have agreed on it, you needn't offer it in evidence. I can just take note of it. You have just called it to my attention. It is in the file and it is dated February 9, 1951, and called a Correction Memorandum.

Mr. Baskin: No. 11. It was attached to the motion for preliminary injunction.

Q. (By Mr. Baskin): Now, Mr. Archbold, will you describe the area of this 37.5 acres of land over which the Forest Service has removed sand and gravel? Tell the Court about how long the creek is, that is, over what area it has been removed, its width, its length and the depth.

(Testimony of Chester A. Archbold)

Mr. Stump: May it please the Court, this is merely a suggestion. We have agreed on a map showing the original ninety-one acres, the present thirty-seven and a half acres and the gravel plant.

Mr. Baskin: But we need to show here the area actually that was mined.

The Court: I suppose what you have in mind is showing how much or whether gravel was removed from this claim?

Mr. Baskin: That is right.

The Court: Well, you may ask him that, and it would [22] be better to ask him, to call his attention to the claim rather than to both sides of the creek which may or may not be in the claim.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): You are familiar with the location of the defendant's claim, are you not, Mr. Archbold? A. I am.

Mr. Baskin: May it please the Court, I would like to place this on the board just for illustrative purposes.

(Placing a chart on the blackboard.)

The Court: Well, is it going to serve some purpose now?

Mr. Baskin: I was just going to have him point out—I think, your Honor, in connection with some subsequent testimony in regard to the defendant's discovery.

The Court: Well, that may be, but in the meantime there is no use of asking him to point out

(Testimony of Chester A. Archbold)

anything that I can see from an examination of the chart myself in chambers.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Tell the Court over what length of an area of the defendant's claim that gravel has been removed by contractors and the Bureau of Public Roads.

A. Gravel was removed directly from a distance of about sixteen hundred feet up the stream and eighty to one hundred feet wide, indirectly by high water washing from [23] probably another eight hundred to a thousand feet above the contested claim, washing down and filling up the holes where gravel had been removed.

Q. Now, has the level of the bed of that creek been lowered by the removal of the sand and gravel? A. It has.

Q. And over that entire length of about sixteen hundred feet? A. It has.

Q. About how much has that bed been lowered?

A. It has been lowered from a few feet at the lower end to as much as fifteen feet at the upper end.

Q. Have you observed them digging holes or moving that gravel? A. I have.

Q. How deep holes have been dug in that area in removing gravel?

Mr. Stump: Just a moment. I didn't quite understand your question.

Q. (By Mr. Baskin): Tell the Court the depths

(Testimony of Chester A. Archbold)

of holes that you know were dug in that creek bed in removing gravel.

Mr. Stump: Just a minute. That he personally dug or was present when they were dug?

Mr. Baskin: No. That he knows were dug.

Mr. Stump: That would violate the hearsay rule if he wasn't there when they were dug. [24]

A. I personally——

The Court: He wouldn't have to be there while they were dug if he knows that they were dug under the authority of the Forest Service.

A. My duties took me there many times when they were operating in the pit, and I know that they removed gravel as deep as twenty feet below the surface of the water.

Q. (By Mr. Baskin): And did the stream then keep washing sand and gravel down?

A. Those holes were all filled up. They are filled up right now level.

Q. And from the top or the upper end of the defendant's claim, how far up the creek has sand and gravel washed down into the gravel pit?

Mr. Stump: If the Court please, I can't see any purpose of that question.

The Court: I think that what is overlooked here is he speaks of sixteen hundred feet up the creek and so on, but how do I know that that is on the claim?

Mr. Baskin: Well, I thought I laid the predicate for that in asking him—well, I will bring that out, may it please the Court.

(Testimony of Chester A. Archbold)

Q. (By Mr. Baskin): In describing the area as you just have, that sand and gravel was removed, was that on the defendant's claim? [25]

A. It was.

Q. All of that area is within the defendant's claim; is that correct?

A. All of the work of removing gravel by machinery was within the claim.

Q. And now——

The Court: Well, was there gravel removed by other means than machinery?

A. On high water periods gravel was washed from up the stream as far as eight hundred feet above their discovery point or the upper line of their claim in contest, washed down from up the stream.

The Court: Well, I don't think the Government could take advantage of that.

A. We did.

The Court: Yes, so far as getting a supply of gravel is concerned, but I mean so far as meeting the requirements of law here.

Q. (By Mr. Baskin): Well, the sand and gravel would flow down from about a thousand feet above the defendant's claim into the gravel pit; is that correct? A. That is right.

Mr. Stump: I am going to object to that. I did before, and the Court didn't rule on it. I don't still see the relevancy of that point. [26]

The Court: I don't either.

Mr. Stump: I ask it be stricken.

(Testimony of Chester M. Archbold.)

The Court: In other words—what do you claim for the testimony that the gravel was washed down into these holes?

Mr. Baskin: Well, may it please the Court, this is a preliminary question. It is showing this, that they removed gravel in one area which was at the upper end of the defendant's claim and that the water continually kept bringing sand and gravel down from a thousand feet up there. Of course we contend that that part of the creek was also appropriated although it is without the boundary of the Government's claim at this time.

The Court: Well, you contend then that it was something like a riparian right, that the Government was entitled to have the flow of gravel continue just the same as the flow of water?

Mr. Baskin: No; that was a use. Well, that is correct.

Mr. Stump: Then it is not pertinent at all if it was above defendant's claim. Now, I don't know why it should be in the record.

The Court: About all it does is to explain the fact that there was a continuous source of supply by reason of the gravel washing down and filling these holes. [27]

Mr. Baskin: Very well.

The Court: And that would explain or show that the use could have been more or less continuous because it was a continued supply, but other than that it has no relevancy.

Q. (By Mr. Baskin): Mr. Archbold, in remov-

(Testimony of Chester M. Archbold.)

ing this sand and gravel explain to the Court just how the water was used, that is, the movement of the water in connection with the removing of the gravel; how would it serve the removal of the gravel?

Mr. Stump: May it please the Court, I don't want to keep objecting, but I can't see its materiality.

Mr. Baskin: Well, here is my point, may it please the Court, that the persons removing the gravel moved the water from side to side at various times for the purpose of washing out the silt and exposing the gravel. I am just explaining the use of the water which, I think, is appropriate in connection with their removal of the gravel.

Mr. Stump: Well, then it is likewise inadmissible because Mr. Archbold admitted they had never worked out there.

The Court: Well, it wouldn't make any difference if he knew, but I don't see how the method of removal could be relevant here.

Mr. Baskin: You mean we can't show that it was removed by machinery and the way that it was removed?

The Court: Well, you can show it in a general way, [28] but shifting the creek back and forth and things of that kind, we might get down into detail here that would take a long time before the Court, and it doesn't serve any purpose.

Mr. Baskin: Well, here is the proposition. The way the Government has used that creek and the

(Testimony of Chester M. Archbold.)

way they contemplated using it is to have it moved back and forth to cover a very wide area which will cover virtually all of the defendant's claim within the thirty-seven acres.

The Court: Well, you can show the extent of the use, but you needn't go into details.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Were there any improvements made on the defendant's claim by the Government or its contractors? A. There were.

Q. Tell the Court what they were.

A. Well, over a thousand feet of roadway and a log loading ramp.

Q. Now, does that roadway parallel the gravel pit? A. It does.

Q. And who built that road?

A. Both Almquist and Berg Construction Companies.

Q. Now, tell the Court whether or not the Bureau of Public Roads with their personnel has maintained or improved that road.

A. That I couldn't say. The Bureau of Public Roads, they had [29] trucks in there and they hauled gravel out on their own operations, but I wasn't there when they were doing it.

Q. As far as you know, it was constructed by the contractors for the Government?

A. That is right.

Q. And what kind of a ramp was left there?

A. A log loading ramp whereby a bulldozer

(Testimony of Chester M. Archbold.)

would shove gravel up the ramp, through a hole and load trucks by gravity.

Q. And was that left there for the use of the Forest Service and the Bureau of Public Roads by the contractor?

A. It was placed there by one of our contractors. We paid for it by the gravel removed, and we requested that it be left there for our use.

The Court: Well, was all this roadway in the area claimed by the defendant?

A. All of the roadway is in the claim; yes, sir.

Q. (By Mr. Baskin): And is that ramp within the claim? A. It is.

Q. Do you know when the defendant posted notices of his claim? A. Yes, I do.

Q. When did he do that? I will strike that; just a moment. We have agreed upon that. Now, when did you learn about that?

A. I learned about it on, I believe, June 26, 1951. [30]

Q. And what did you do about it?

A. Well, Mr. Stump called at my office and told me about it, so I immediately went out to see if it was so.

Q. And did you ever examine the area of his claim, his post and discovery post and his corner post and so forth? A. I did.

Q. When did you do that?

A. My first inspection was on the evening of June 26th. I located the blazes at the lower end of his claim. The next day in company with W. A.

(Testimony of Chester M. Archbold.)

Wood of the Bureau of Public Roads, we located corners three and four; that was on the 27th, June 27th. I visited the claim a number of times, but on November 7, 1951, I traced out every foot of the claim, made notes on the existing corners, to see whether it was properly located.

Q. Now, did you ever examine his discovery post? A. I did.

Q. When did you do that?

A. A number of times. I don't have the date here right now, but on November 7th I did, of 1951.

Q. Now, Mr. Archbold, with reference to the area from which Government contractors removed sand and gravel, tell the Court where the discovery post is located.

A. The discovery post is located at the upper end and maybe a few feet over the boundary of our thirty-seven-and-a- [31] half-acre claim. It is pretty hard to determine just how far it is there.

Q. It would be only a few feet, if any?

A. Just a few feet over.

Q. Now, tell the Court whether or not you have made any improvements or removed any timber up above his discovery post for the purpose of removing or assisting in the removal of gravel in that area.

Mr. Stump: I object to that question. That is not in issue. We are not claiming that.

Mr. Baskin: May it please the Court, I am showing that that discovery post is within the area in which the Government has removed sand and

(Testimony of Chester M. Archbold.)

gravel, and the improvements are what the Forest Service has done for the purpose of facilitating the removal of that sand and gravel.

Mr. Stump: They haven't deemed it very important, your Honor, when they don't even include it in the withdrawal. It is even outside of the withdrawal area.

The Court: The fact that it is not in the withdrawal area is immaterial. It is evidentiary here in support of their contentions. Objection overruled.

A. The contractor felled timber above, probably fifty feet above, this discovery point. He had his bulldozer within fifty feet of it to divert the stream and cut across to break down the southeast bank of the stream for development [32] work. The corners were blazed between some of these stumps.

Mr. Stump: Now, if the Court please, as a matter of record, this contractor, I don't know who he means.

A. When I talk about the contractor, it is always the Forest Service working on one of our approved Forest Service contracts.

The Court: That is what I assumed it to be, otherwise it would be immaterial.

Q. (By Mr. Baskin): And then timber was removed about fifty feet above his location, his discovery point; is that right?

A. That is right.

Q. Now, in connection with the removal of that

(Testimony of Chester M. Archbold.)

sand and gravel, state whether or not that discovery was made on the land as it originally existed.

A. It was not as originally existed.

Q. Well, now, tell the Court the difference then.

Mr. Stump: May it please the Court, I can't see the materiality, unless counsel contends that discovery must be made on land in its original shape, whatever that was, whatever time, because that is not the law. Now, I don't see—it is our point—I wouldn't care who went in and uncovered the area; if they weren't in possession, or it was abandoned, we can go in and claim their discovery. Now, I believe counsel [33] will agree that is the law. Then what is the purpose of this?

The Court: Well, he contends here that there was no valid discovery, and I suppose that he intends to show something in support of that contention, and, of course, he must be allowed to do it. I can't shut him out. Objection overruled.

Mr. Stump: I assume then that this was meant as preliminary to prove lack of discovery of the mineral we claim was there. Is that the point?

The Court: I don't know how it could be relevant for any other purpose. Go ahead.

Q. (By Mr. Baskin): Tell the Court the difference in that area where his discovery post was located as it originally existed and as it existed at the time he erected his discovery post.

Mr. Stump: I want to object for the record, your Honor.

The Court: Objection overruled.

(Testimony of Chester M. Archbold.)

A. By removing the gravel below this point, high water washed down gravel to fill it, and these stumps, gravel was washed from under them and they just settled down there to their present location. The location must be all of five to six or more feet from what it was before we started to work there.

Q. Well, those stumps—— [34]

The Court: You mean the level of the ground had been lowered?

A. That whole area there, in and around this discovery point, had been lowered at least five feet.

Q. (By Mr. Baskin): And are those stumps, that you are speaking of, the stumps that were caused by cutting of the timber for the purpose of removing that gravel in that area?

A. We had planned to go farther up stream to take out more gravel, yes, in developing the whole area.

Q. Now, when you examined his discovery post, state whether or not you observed a notice there of any kind.

Mr. Stump: If it please the Court, I would like the witness to state at which time he has reference to. He said he went out there in June and also on November 7, 1951.

The Court: Of course that is a matter for cross-examination.

Q. (By Mr. Baskin): You may answer the question. When did you first see the discovery post?

A. On August the 2nd; I won't say it is the first

(Testimony of Chester M. Archbold.)

time that I saw it. On August 2, 1951, in company with six other men, I inspected the location notice.

Q. And tell the Court the condition of that or what that notice said and whether or not it was signed by the locator. [35]

A. The location notice was a standard placer claim location giving the description of the claim, and it was a typewritten notice. The locator's name was typewritten on it as was his witnesses in one case and printed by ink in another, but no handwriting in longhand signature.

Q. Now, tell the Court the height of that discovery post.

A. As I recall, it was about thirty inches above the ground.

Q. What was its dimensions?

A. It was two and a half by two and a half inches, planed post.

Q. And what did the discovery——

The Court: You said it was planed?

A. It was a piece of planed stake. It started out with probably a three by three and it ended up two and a half inches square.

Q. (By Mr. Baskin): What did that discovery post have marked on it, if anything?

A. Discovered June 21, 1951; H. F. Schaub, Locator; and it had the distances from all around giving the distances to circumscribe the whole plat; 450 feet southeast from Discovery Post to Post No. 2; thence 1300 feet southwest to Post 3; 600 feet northwest to Post 4; 1300 feet northeast to Post 5;

(Testimony of Chester M. Archbold.)

thence 150 feet southeast to Discovery Post; and marked on it was Whipple Creek, Placer Creek, [36] Placer No. 1.

Q. Did you examine the boundary lines?

A. I did.

Q. Tell the Court the condition of the boundary lines.

A. The upper boundary line between Corners 5, 1 and 2 is plainly marked. The lower boundary line between Corners 3 and 4 is plainly marked. The two side lines, you have difficulty to follow the lines without considerable searching back and forth to find the blazes.

Q. Did you examine Post No. 2?

A. I did.

Q. Tell the Court the height of that one and its dimensions.

A. It is a two-and-a-half-inch by two-and-a-half-inch post, thirty-two and a half inches above the ground.

Mr. Stump: What was the last?

A. Thirty-two and a half inches above ground.

Q. (By Mr. Baskin): Did you examine Post No. 3? A. I did.

Q. Tell the Court the condition of that post or the dimensions of it and anything it had written on it.

A. Two and a half inches by two and a half inches, twenty-eight inches above ground. It is marked Post No. 3, Whipple Creek Claim No. 1. The distances between corners may have been on the post but they are so indistinct you can't read them; I couldn't on that date. There is a notation

(Testimony of Chester M. Archbold.)

also there on that post in indelible ink: [37] "Visited here and also Corner No. 4 this date, 6/27/51, at 11:26 a.m."; the initials "W.A.W. and C.M.A."

Q. Do you know whose initials those are?

A. W.A.W. is for William Wood of the Bureau of Public Roads, and C.M.A. is myself, Archbold.

Q. Did you examine Post No. 4? A. I did.

Q. Tell the Court the height and dimensions of that post.

A. Two-and-a-half by two-and-a-half-inch post, twenty-nine inches above ground. It is marked Post No. 4, Whipple Creek Claim No. 1. There are no distances placed on that post.

Q. Now, did you examine Post No. 5?

A. I did.

Q. Tell the Court the——

A. Two-and-a-half by two-and-a-half-inch post, thirty-two inches above ground. It is marked Post No. 5, southeast 150 feet to Post No. 1 and southwest 1300 feet to Post No. 4. There is no claim name or number on that particular post.

Mr. Baskin: You may examine the witness.

The Court: I think we will recess now.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon, the witness Chester M. Archbold resumed the [38] witness stand and the examination was continued as follows):

Mr. Stump: Mr. Davidson will cross-examine the witness.

(Testimony of Chester M. Archbold.)

Mr. Baskin: I would like to ask a few more questions, may it please the Court.

Q. (By Mr. Baskin): Mr. Archbold, was all the gravel that was removed from that gravel pit you have described under the authority of the United States Forest Service? A. It was.

Q. And is the defendant's claim within the ninety-one acres that was set aside as a public service site on or about September 3, or 11, of 1940?

A. It is entirely within that area.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Davidson:

Q. You say the gravel washes down the hill?

A. It washes down the stream bed.

Q. And fills up the pits as they are dug?

A. It does; yes.

Q. What happens? Does gravel come down the stream continuously?

A. Evidently on high water it would wash on down to the bay.

Q. And how big a deposit is there in the [39] bay then?

A. There is a large deposit down in salt water; yes.

Q. As large or larger than Whipple Creek?

A. I wouldn't say that; no.

Q. No overburden on it?

A. Not on salt water; no.

(Testimony of Chester M. Archbold.)

Q. It is a very substantial deposit?

A. It is.

Q. And the Government owns that?

A. Well, I would say it belongs to the Government below mean high tide and above mean high tide, too.

Q. On that map over there, that shows the ninety-one acres and the water line, does it not?

A. No, it doesn't. That just shows the thirty-seven-and-a-half-acre area.

Q. I am sorry. We have a map that shows all of this property—this map.

A. That shows the entire ninety-one and a half acres which includes the thirty-seven and a half acres and also the beach.

Q. This other substantial deposit which you say is down here at the mouth of the creek——

Mr. Baskin: Well, may it please the Court, I don't see the relevancy of any other deposit.

The Court: I don't either.

Mr. Davidson: The questions are in good faith, your [40] Honor; on the grounds that we are trying to get money out of the Government by obtaining the only gravel source available, I am just showing here that there is a source of equal size and use and equal distance from the road, on the other side of the road, owned by the Government.

The Court: Well, I think that the bearing of that on the question of good faith is so slight as to have very little evidentiary value.

Mr. Davidson: Well, it is only because counsel

(Testimony of Chester M. Archbold.)

in his opening statement said that it was an attempt to get money out of the Government and, therefore, not in good faith, and I think it is quite valuable to show that, if the Government owns another deposit of gravel an equal distance from this road, just on the other side of it, that Mr. Schaub couldn't possibly attempt to get money out of the Government, at least no more, couldn't charge them any more than it would cost them to go down at this other pit.

The Court: But the fact that there are half a dozen other places available wouldn't preclude the Government from taking the position in this case that the acts of the defendant are not in good faith. In other words, the position of the Government, as I understand it, is that they have gone on this area and appropriated after a certain fashion and have done certain acts on it. Now, that is the basis of the claim of lack of good faith, so it is immaterial what is done at the [41] beach.

Mr. Davidson: Well, if counsel concedes that it is not an attempt to hold up the Government, why, I would agree with that.

The Court: Well, it is not necessary for him to make any such concession. I don't think it is—it is the position that the Government takes, and there is no reason, or the Court really hasn't any power, to make him relinquish that position. He has a right to maintain his position and theory.

Mr. Davidson: I just brought it up because he did assert that position.

Q. (By Mr. Davidson): Then next, the dis-

(Testimony of Chester M. Archbold.)

covery post is outside the bounds of these thirty-seven acres, is it not?

A. As near as it can be determined, it is several feeet over the line; yes.

Q. The Forest Service made that survey, did it not? A. The Bureau of Public Roads.

Q. And the discovery post is outside the boundaries of that survey? A. Yes.

Q. Now, in getting back to the gravel washing down, when a contractor dug the gravel out, the next flood filled that hole up, I take it?

A. It did; yes. [42]

Q. What evidence remained on the ground that it had even been used?

A. By breaking down the stream bed, widened the stream bed to its present width of eighty to one hundred feet wide. It was only fifteen feet to start with when we started in there.

Mr. Davidson: Your Honor, this is a stipulation as to what witnesses will testify, if called, chiefly contractors.

The Court: Well, you want to—is that stipulation made a matter of record in the case?

Mr. Baskin: I haven't looked at it. I assume it is correct. I directed the typing of it. I haven't read it. I don't know what purpose he has in mind.

Q. (By Mr. Davidson): You testified as to the removal of the gravel by the contractor Berg?

A. Yes; I testified that he moved gravel on two separate contracts.

Q. Now, isn't it true that he took that gravel

(Testimony of Chester M. Archbold.)

from the bed of the stream and did not remove any overburden?

A. No. He removed lots of overburden. That is what almost broke him to start with.

Q. Well, then when he says: "Well, good gravel was found in all pits. The cost of clearing, grubbing and removal of timber and overburden was too high for the amount of gravel needed for this contract. We, therefore, concentrated [43] on gravel removal from the stream bed."

A. After he found that he had too much overburden to remove, he put the stream to work for him.

Q. That is right. And he progressed upstream through the stream bed, or did he?

A. He followed along the stream bed with the road and tried to keep it on the upland and out of the stream, but high water would wash it, and he had to swing his road as to where the stream left available land to work on.

Q. Well, then did he take—you say he stopped removing overburden after a little while?

A. Yes, he did. He allowed the high waters to undermind the creek banks and beds and wash out the overburden.

Q. And when did he finish that contract?

A. I will have to refer to my notes here as to when. He had two contracts.

Q. That is right.

A. One on July 27, 1948, which was completed in

(Testimony of Chester M. Archbold.)

1949, and his second one from June 28, 1950, which was finally completed the spring of 1951.

Q. Well, this statement here refers to the one he finished on June 30, 1949, and this is the one in which you testified he moved 15,369 yards of gravel.

A. That was the first contract.

Q. That is the largest single contract removal that has ever [44] been from there?

A. That is right.

Q. He did that in June, 1949, and, as you say, he took some overburden and then he went into the stream bed and didn't take any more overburden. What happened that winter? More gravel washed down the stream? A. Sure; sure, it did.

Q. And did it fill up the stream again?

A. Filled it all up again.

Q. What evidence was there that Berg had ever been there?

A. His road was still there alongside the bank.

Q. The road was alongside; but looking at the stream there was just no evidence that anybody had taken gravel out? A. Oh, certainly.

Q. It was full of gravel again?

A. But in the meantime it had lowered the stream bed as much as fifteen feet by filling these holes there, so it was plainly evident that somebody had been in there. You couldn't get out of it. The stumps were all along both sides that he had cut to clear. He had to remove not the overburden but he had removed timber which were undermined, and the stumps were undermined, and he had to pull

(Testimony of Chester M. Archbold.)

them out and windrow them on the other side of the stream outside of his road.

Q. There was no evidence from the overburden; there was no [45] evidence outside the banks of the streams, except that the stream was deeper and gravel was exposed on both sides?

A. As I said, the original stream bed was clogged with downed timber for hundreds and hundreds of years, roots and stumps that confined it in one channel about fifteen to twenty feet in width. After Mr. Berg finished that contract, it was as much as eighty feet wide. Anybody could see that somebody had been in there.

Q. And what cleared the stumps out of the stream?

A. The stump cuts were still there on timber that he had to take the timber out and get rid of it. He burned some and windrowed the rest, and it is still there. Anybody can see that.

Q. This road, he constructed that for the Forest Service, you say?

A. We laid out the route of the road as to where it would be accessible to the Forest Service in developing that gravel pit. We discussed his efforts there.

Q. The contract provided: "A service road from highway to pit will need to be constructed by the contractor without remuneration for such things as his needs require."

A. It stated that he would be required to build a road in there to remove the gravel at his bid price

(Testimony of Chester M. Archbold.)

of the gravel removed. That is how we paid for the road.

Q. But for whose needs was the road [46] built?

A. It was built for the Forest Service.

Q. The contract says "his needs." Speaking of the contractor, it means the Forest Service?

A. That is right. That is the way I construe it. Any of the contractors working for us, it is the same as if the Forest Service did the work. That is the way we consider it.

Q. Mr. Berg also says: "During late summer of 1949 we moved approximately one thousand cubic yards of borrow fill and surfacing from the Whipple Creek pit for a number of driveway approaches extending from Wards Cove to Clover Pass."

A. That is right. He took gravel out of there.

Q. Was that a Forest Service contract?

A. That was not a contract; no. He took that out while his equipment was still there under free use with just verbal permission to do that.

Q. You permitted him to do that?

A. That has been our policy in all of the gravel pits that we have opened up.

Q. To give free use to settlers?

A. To develop driveway approaches, gardens, foundations or any way to develop the land alongside of our roads, they are entitled to free use of both gravel and timber or earth or whatever they want to move, rock. [47]

Q. Did you inquire of Mr. Berg of how much he charged for that gravel from the people he sold it to?

(Testimony of Chester M. Archbold.)

Mr. Baskin: Well, I object to that, your Honor. I don't see that that is material.

The Court: Objection sustained.

Q. (By Mr. Davidson): That was during the period while his own equipment was already in there, was it not? A. That is right; yes, sir.

Q. Getting back to the recreation area classification, you testified that there were five hundred, that there was some work done there in 1940. What has been done there since 1940 for recreation use?

A. The only work that we would have any record of there during that period after the C.C.C. worked there was the visitation of the area by our forest guard and the forest ranger and the foreman of construction who would look in there during that period. That is part of their work on all the recreation areas. It was classified as a recreation area, so it was part of their duties to call in and look at it. There would be no record other than that.

Q. Do you have any such record as that?

A. We wouldn't; no. Every time they drove out the road we would just have a mileage record or their monthly mileage report.

Q. Was there any further cutting of [48] trails?

A. No. We did enough during that period with those fifty men in the short while they were there to do what we wanted to do.

Q. And those trails stayed open ten years?

A. They are still there. The timber, the cordwood is still piled up along those trails.

Q. The wood that was cut ten years ago?

(Testimony of Chester M. Archbold.)

A. It is still there, some of it.

Q. Yes; and nobody used it; scarcely anybody used it in ten years?

A. Oh, no. I would say that the most inaccessible is still there if they didn't pack it so far, but they burned up the most of it.

Q. Now, during this use as a gravel pit, this road, there was a great deal of machinery in that area, was there not?

A. During the various times; yes.

Q. While it was being operated as a gravel pit?

A. Yes.

Q. And which the Forestry Service regards as continuously operated as a gravel pit? A. Yes.

Q. During the periods when there was equipment running in there, trucks going back and forth on the road, I take it there were very few people having picnics there?

A. On Sundays I have been out there and target practice was [49] being carried on at the gravel bunker. Targets were there every Monday morning when the crew went to work, so they were using it, and picnic fires were there.

Q. The gravel pit is part of the picnic area and used both for recreation by the public and for mining gravel by the contractors?

A. The kids went up there, after the gravel was washed down and left windrows of fine sand, and took over that gravel pit for recreation purposes on Sundays and when there was no work going on.

Q. There has been no further expenditure of

(Testimony of Chester M. Archbold.)

funds for labor on that area since 1940, however, for development as a recreation area?

A. Not as a project; no; just by guards. Our guard, who is on during the summer to look after fire, our recreation guard would call in there and see if there was any picnic fires left burning. We would have no record of that, no, of every instance of his visitation.

Q. No; but there has been no further cutting of trails? A. No.

Q. No further labor put in or money put in to develop it into a recreation area?

A. That is right.

Q. This regulation, Plaintiff's Exhibit 1, Regulation U-11, Free Special Use Permits, Section J, is that the basis for [50] the letting of these contracts?

A. No. We consider that land as Forest Service land to use as we see fit.

Q. That is the land itself?

A. The land and the gravel, the contents of it. It was sand. If it was suitable for road-building purposes and we wished to take that from any of the National Forest Service land, why, we would take it.

Q. Well, what does this next section—"Material of this kind will not be permitted free to contractors if the terms of the contract require the contractor to furnish all materials, since in such cases the contractor has figured the expense of purchasing material and to grant free use would be inconsistent with the purpose of this regulation."

A. In our contracts it is provided that they take

(Testimony of Chester M. Archbold.)

their gravel there free of charge. It was to be put on a Forest Service project, and there would be no sense in charging the Government to take its own property to place on another road.

Q. Is this the contract?

A. That is the one that is signed by Berg Construction Company. That is the one.

Q. Calling your attention to Article 1 of the contract, what does that say? [51]

A. "Article 1. Statement of Work. The contractor shall furnish the materials and perform the work for grading and surfacing 1.64 miles of South Point Higgins Road with spur at Ketchikan, Alaska."

Q. Now, does that fit in at all with this regulation? The regulation says——

Mr. Baskin: Well, your Honor, I object to any further questions along that line.

The Court: Well, I don't think the Court is concerned with any consistency or inconsistency between the regulations and the contracts or anything else. The only question, as I see it, is whether there was anything done out there even though it is only under color of a claim of right. It doesn't have to be one hundred per cent legal or anything of that kind or consistent.

Mr. Davidson: Well, your Honor, I feel the rule of law is that Congress could only dispossess us of the lands of the United States, and it must be under the authority of Congress.

The Court: This doesn't go to the disposal of it.

(Testimony of Chester M. Archbold.)

This goes just to certain uses made of it. The fact that you might be able to point to some inconsistency between the regulations and what was done with it is something that the Court is not going to consider here.

Mr. Davidson: This regulation of free use [52] permits is the regulation which appropriates this land for the Government use, this designation as a recreation area. The Forest Service takes the position when there is a recreation area that there cannot be a mineral claim to such an area.

Mr. Baskin: Well, I object to that, may it please the Court. The witness has only testified to the appropriation or acts of appropriation by the Federal Government.

Mr. Davidson: He testified to the classification too, your Honor.

The Court: Well, but you are asking him now to express an opinion on a legal question which is for the Court. The Court isn't interested in what opinion he may have.

Q. (By Mr. Davidson): On this prior mineral claim, what basis was that claim contested on?

A. That was contested for the simple reason that we had our plans to develop that as a recreation area. It hadn't been set aside, but we were working towards that end. We maintained that he did not have a mineral claim there under a placer designation, and it was proved that he didn't.

Q. Because there was no gold there?

A. Yes. He proved gold and that is all he

(Testimony of Chester M. Archbold.)

proved, and we proved that he didn't have it there. The claim was declared null and void, the two of them.

Q. Now, in this discovery post of Mr. Schaub's was there [53] gravel there?

A. There is gravel inside. I will not say that there isn't, because I have a picture showing some stones there, which gravel is pretty hard to say how big it can be before it isn't gravel.

Q. Is gravel at the discovery post?

A. In and around and amongst the roots of this stump that the post was placed in; yes.

Q. Have they classified any areas in this Tongass Forest as wilderness areas?

A. Not as wilderness areas.

Mr. Baskin: I object unless he is contending that this area here has been classified as a wilderness area. Whether other areas have been classified as wilderness areas should be immaterial.

The Court: Yes; I think so.

Mr. Davidson: Well, your Honor, I think we are coming to a point which we feel is very material in this case particularly on the grounds of this appropriation by classification. It is, I think, an extremely serious thing for the forests, which is virtually all of Southeastern Alaska, if a classification constitutes an appropriation for mineral purposes, and I am now prepared to show that the regulations of the Forestry Manual provide that areas which may be valuable for minerals when it is developed,

(Testimony of Chester M. Archbold.)

its potentials should be [54] classified as recreation areas since that is the best way——

The Court: Should be what?

Mr. Davidson: Should be classified as recreation areas since that is the best protection the Secretary of Agriculture can afford against a mineral entry; and I will further show that the same regulations, shortly thereafter, point out that the only way you can protect against a mineral entry is by withdrawal through the Secretary of the Interior. I can't explain the first paragraph in the regulation. It just doesn't make any sense to me, but it is there, and it clearly does influence regional foresters, which, I believe, was the case here, and I would like to show that regulation.

The Court: If it is a regulation, the Court can take judicial notice of it.

Mr. Davidson: Well, it is not a regulation. It is part of the Forest Service Manual, which is the same thing as these are.

The Court: Is it in evidence?

Mr. Davidson: No. I will put it in evidence.

Q. (By Mr. Davidson): Are you familiar with that regulation, U-3 B?

Mr. Baskin: Well, your Honor, I don't see that that would be material unless it is shown it is, and I object to any further examination. The regulation, if it is a regulation, he could ask the Court to take judicial notice of it [55] and perhaps argue it, but as an evidentiary matter it is not material and is objectionable.

(Testimony of Chester M. Archbold.)

The Court: Yes; if it is a regulation, the Court will take judicial notice of it upon being asked to do so.

Mr. Davidson: This is not, however, a regulation, your Honor; at least it is not in the Code of Federal Register. It is, however, I think, a fact which illustrates most of the importance of this case and the view the Forestry Service itself takes of this claim of appropriation.

The Court: How is it cross-examination on anything he testified on?

Mr. Davidson: He testified it was classified as a recreation area.

The Court: What do you propose to show by this?

Mr. Davidson: I propose to show that was the form adopted to prevent a mineral entry.

Mr. Baskin: What was that?

Mr. Davidson: The form it was classified under, and it has, you might say, not been administered under it since there was no subsequent recreation.

The Court: Set aside as a recreation area for the purpose of keeping out mineral location?

Mr. Davidson: Yes. It is not a regulation.

The Court: It could be a regulation for the instruction of the Government or the Forest Service without [56] being printed in the Code of Federal Regulations.

Mr. Davidson: That is right.

The Court: But instead of referring to the regulation, ask him about it.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): Are you familiar with that provision of U-3 B——

Mr. Davidson: Your Honor, I had that this morning but I understood Mr. Baskin would bring it. I don't have it at the moment.

The Court: What do you want me to do about it?

Mr. Davidson: I would like a short time so I could get it.

The Court: I don't want to take another recess now. Can't you go on to some other phase of the case?

Q. (By Mr. Davidson): When was the day that you examined these posts and lines?

A. The one upon which I have a record is November 7, 1951.

Q. I understand all of the testimony you gave before was as of that date?

A. I testified that I visited the area a number of times but I didn't have the dates with me.

Q. This is the date you mentioned seeing the posts? A. That is right.

Q. How wide are these posts corner to corner, across diagonally? [57]

A. From Corner 5 to Corner——

Q. No. Each stake.

A. Two and a half by two and a half square, why, you can figure it out crosswise.

Q. A little over three inches?

A. If I had one here, I could say.

Q. You didn't measure it that way then?

(Testimony of Chester M. Archbold.)

A. No, I didn't measure it that way; no.

Q. And you said, I believe, that the lower lines 3 to 4 were plainly marked, easy to find?

A. Yes; from 3 to 4.

Q. And lines 5, 1 and 2 were plainly marked?

A. That is right.

Q. And that the location notice described the boundaries as 1, 2, 3, 4 and 5? A. Yes.

Q. And gave the courses and distances?

A. Yes.

Q. So you knew where to find boundaries, you were able to find both ends, and it is a straight line in between, isn't it?

A. I can testify the corner between 2 and 3, as blazed, is not a straight line. I followed it for about an hour and a half to try to find it to see if it was a straight line but it is not. [58]

Q. What obstructed it?

A. Evidently Mr. Schaub——

Q. What obstructed the view? What was in the way?

A. Regardless of how it is described, the marking on the ground is what we go by.

Q. I think the claim goes by the line between the posts. I want to know what was in the way of that line. A. Trees.

Q. You take the position that a mineral locator should cut down the trees on the line?

Mr. Baskin: I object to that.

The Court: It is nothing that would be of any assistance to the Court.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): What kind of trees would you have to cut down?

A. You would have to clear it out to make it distinct; huckleberry brush. We could have seen it.

Q. There was a blazed line through there though?

A. Yes. By considerable trouble I located the blazed line.

Q. What did you say it took you; about an hour? A. It took me all of an hour.

Q. In any event the upper and lower lines were clearly located?

A. That is what I testified.

Q. You didn't have any doubt as to where the line was between [59] those two posts; you knew where it was?

A. I knew. I visited them both. I visited all the corners so I knew just exactly where they were.

Q. And you knew actually where all four corners were from your first visit?

A. No, I didn't. I only found two corners the first visit.

Q. That was in the evening, that first visit?

A. And the next day. We were dressed in office clothes, so we put some of the surveyors to find it. We couldn't find it. There was no evidence at that time of side blazing or anything else to follow the claims, so whether the blazing was all done on the day the claim was first staked I don't know. I didn't find the location notices until June 28th.

Q. Had you looked for them before then?

(Testimony of Chester M. Archbold.)

A. Yes, I did. I didn't find them. By following the description I had I didn't find them.

Q. Now, on this second point, this area that was reserved, you said, on February 9th, you testified the procedure followed was that the Bureau of Public Roads requested this area be classified or reserved?

A. Yes. During 1950 the Bureau of Public Roads had done considerable work there to prospect and prove to them that the material was there in sufficient quantity to justify setting it aside for a major project. I had discussed [60] throughout the year with Mr. McCann and Mr. Wyller of the Bureau of Public Roads as to the suitability of the material, and they proceeded to prospect to assure themselves that there was sufficient there.

Q. You are familiar with the correspondence on that matter? A. I am.

Q. Well, let's get on back to another point. On the map there could you point out all of the areas where gravel has been taken?

A. The bridge is located right here. The crossing of Whipple Creek by the Tongass Highway is right here—no—that is a proposed new route; it is way up here. In building the approaches to that bridge gravel was obtained from this area, there, and from down in here.

Q. From where?

A. For the approaches to that bridge. There is quite a fill all the way around. That was in the

(Testimony of Chester M. Archbold.)

original construction of Tongass Highway to that point.

Q. Where did that come from; from the stream bed?

A. From the stream bed; yes. It was right in the stream. It was easy to get, so that is what they took, but they dug a hole.

Q. Did that hole fill up?

A. It filled up from up here. This stuff up here moved down.

Q. Is there any evidence of that 1934 removal left? [61]

A. Yes; by the stream bed being lowered and the roots showing and undermining of adjacent big timber. As soon as you commence to dig in the stream, work, why, there is evidence there. The next removal was the Coast Guard came in after the road was constructed—no. I will say there in the meantime—it hasn't been introduced here— we built another road. The Pond Reef Road takes off down here about a quarter of a mile. We built that road with this material out of here too. That has been skipped up, but it is in my notes though. And that further reduced the stream bed and dug a bigger hole, and we went up into here farther each time and then later on with the Coast Guard coming in and removing what they did washed from down, from as far as up here. Thence every removal kept proving the volume of gravel to be found there. In our contracts Berg was the first one that went in. At first there was a detour. It is still there, and

(Testimony of Chester M. Archbold.)

you can see it. It goes right down across here. The trucks moved across there around the proposed bridge in building those approaches, and they hauled gravel up each side, and that was the first indication. Then, when Mr. Berg went in, this road over here was still usable.

Q. Why did he have to build another one then?

A. He didn't build another one. He used the same one, only extended it up the creek. He just kept moving it up as [62] he needed more gravel. There is one big hole right in here that anybody can see. He removed a lot of overburden there. It was too soft so he was forced that he dug prospect pits way back over in here. He was forced then to stay to the stream bed here and work it regardless of the size of the timber along here, and he went up on the first contract to about this location, right in here. Mr. Almquist came then and extended the road he started and took all the gravel in the stream that was already developed and went on and extended way up to here. He felled the timber way back up in there. The original stream ran not where it is now but it went away over in here.

Q. Now, what would you call the developed area of this thing?

A. The developed area takes this stream bed here, over beyond the edge of the road, along here all the way, everything that is shown in the stream bed. That stream bed, where it is shown here, fluc-

(Testimony of Chester M. Archbold.)

tuates; it changes all the way across. I doubt if it is in that location right now.

Q. Is there any reasonable way—how would anyone find the boundaries of the developed area?

A. It is in plain sight.

Q. I know it is in plain sight, but you said right now it could be here or there.

A. No; I said the stream. The stream, it is doubtful if it [63] is in that exact location because there have been a number of freshets since we pulled out of there and the last contract came up.

Q. You called the stream the developed area?

A. I certainly do.

Q. And I asked you the other part of the developed area; did you say this?

A. Over to this.

Q. Is it this, or is it this?

A. Well, when you get right down to it, the whole area that shows anything whatsoever is developed. All these test pits here is developed. It is proving. It is prospecting. Any miner would say that that is so. In open pits, you can say that that is an open pit.

Q. Yes—the Forest Service.

A. We do when it is necessary to build roads.

Q. The Bureau of Public Roads were vitally concerned in the development of this pit, were they not?

A. No, I wouldn't say that they were vitally concerned any more than the Forest Service is.

Q. I mean, they are the ones who prepared that.

(Testimony of Chester M. Archbold.)

A. They prepared that plat; yes.

Q. Yes. Who did the prospecting and the digging of the holes there?

A. Those that are shown were dug by the Bureau of Public [64] Roads.

Q. And they asked that it be withdrawn for their use?

A. For a joint use; for the Bureau of Public Roads and for the Forest Service.

Q. They were fully familiar with that area, were they not? A. They are.

Q. And Mr. Wyller, was he familiar with that area? A. Yes, he is.

Q. Do you recognize that letter?

A. I believe I have a copy of that in my file.

Q. What does the last paragraph of that letter say?

Mr. Baskin: Well, may it please the Court, I don't see that the contents of the letters are material. He can testify as to what they did. So, I am going to object.

The Court: I don't either. What somebody else said is not material here, as I see it, on the cross-examination of this witness.

Mr. Davidson: I would just like to know whether Mr. Archbold agrees with Mr. Wyller when he said, "We also believe the area reserved should extend up the creek from the highway, taking in the gravel deposits now untouched and located above the present pit."

Mr. Baskin: Well, may it please the Court, now

(Testimony of Chester M. Archbold.)

he is getting as to the point of whether or not the pit should be extended a lot farther than what it is. That is just a [65] matter of opinion here. We are only asking for that that has been developed, and so——

Mr. Davidson: I can of course call Mr. Wyller to testify if that was his opinion when he made the thirty-seven acres——

The Court: That what was his opinion?

Mr. Davidson: That we believe it should extend up the creek.

The Court: Well, that is absolutely of no probative value here, what he believed.

Mr. Davidson: He was fully familiar with the pit.

The Court: It doesn't make any difference whether he was. His opinion, as I say, is of no evidentiary value on the questions before the Court.

Mr. Davidson: Well, Mr. Archbold testified or said it was developed all the way up and past the thirty-seven acres.

The Court: Well, if you have any witness, whether it is Mr. Wyller or anybody else, who will contradict Mr. Archbold on a material matter, you may put him on the stand.

Q. (By Mr. Davidson): Now, in getting to the thirty-seven and a half acres, what is the title of that thirty-seven-and-a-half-acre map? You say it is proposed for withdrawal; is it not?

It was; yes. That was proposed. We had to have a proposal [66] to start with.

(Testimony of Chester M. Archbold.)

Q. That is right. And then what was the next step?

A. The next step was to withdraw it as far as the Forest Service could on February 9, 1951, along that line. We had already withdrawn, as far as we could see, but this was just another step.

Q. The Bureau of Public Roads proposed that it be withdrawn, and then what did your office do?

A. We withdrew it by Correction Memorandum No. 11.

Q. That says it is withdrawn?

A. It was withdrawn immediately at that time.

Q. What area did that Correction Memorandum describe?

A. The thirty-seven and a half acres that are shown there.

Q. Isn't it true that it only described the area north of the highway?

The Court: Well, it is in evidence, the Correction Memorandum.

Mr. Baskin: It will speak for itself, may it please the Court.

The Court: Yes.

Mr. Davidson: I just wanted to find out if this witness knew that there was this discrepancy.

Mr. Baskin: Well, that at least covers the defendant's claim, and that is the only land in litigation.

Mr. Davidson: Yes; but I want to show how these [67] things are done.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): Are you familiar with this letter?

A. I have a copy of it. I have the record right here in my notes.

Q. That withdrawal was that area "is hereby reserved," is it not, something in words to that effect? A. Yes.

Q. It is reserved. Now, this letter——

Mr. Baskin: Well, may it please the Court, unless it is shown that that relates to the case, I am going to object to the contents of it.

The Court: Of course I can't tell. I haven't seen the letter. And all I want to call attention to at this time is that I was led to believe that this hearing would only take a few hours, and it looks now like it will take a week.

Q. (By Mr. Davidson): Well, let me ask you if this letter was written by the Forestry Service and in connection with the thirty-seven-and-a-half-acre withdrawal?

A. That was one of the steps of withdrawal.

Q. That is right. And this letter was written four days after the Correction Memorandum?

A. What is the date of that?

Q. Well, it says—no, it was not. The original letter was dated two days before the Correction Memorandum, the covering letter? [68]

A. That is right.

Q. And the Chief Forester sent a form of letter to be executed by the Chief Forester in Washing-

(Testimony of Chester M. Archbold.)

ton directing a letter to the Bureau of Land Management——

Mr. Baskin: May it please the Court, the defense has admitted that the Forest Service forwarded that letter to the Bureau of Land Management, forwarded the amount and the letter requesting the withdrawal, between February 13th and March 8, 1951, so I don't see where that relates or is material, your Honor. They admitted that in the request for admissions.

Mr. Davidson: All I want to show, your Honor, is that at the date they issued the Correction Memorandum, saying the area is reserved, they wrote to Washington recommending that you withdraw this area.

The Court: Well, if it casts any light on when the area was withdrawn, why, of course you may go into that.

Q. (By Mr. Davidson): Then let me ask you this. Did the Forest Service recommend that the area be withdrawn at the same time it issued this Correction Memorandum for its local records, saying that it is withdrawn?

A. As I take it, that letter was written on February 7th; the Correction Memorandum was written on February 9th; that is the point you are trying to make?

Q. That they were simultaneously—they were part of the same [69] transaction?

A. That is right, sure; that is right.

Q. The chief officer or region officer here re-

(Testimony of Chester M. Archbold.)

served that area at the same time he wrote Washington asking Washington to reserve it?

A. To complete our land records. There was just that little lapse is all. It took time to do it, and that is the reason it is two days off.

Q. To complete whose land records?

A. The records of the Southern Division of the Tongass National Forest. I have to have that in my land records.

Q. Well, I am just trying to see why the Correction Memorandum says it is reserved, and at the same time you ask Washington to withdraw it?

A. Well, that is beside the point as I see it. The way and policy that we handle our lands records down there, that is just one step in it is all.

Q. But this letter to Washington has nothing to do with your land records down there?

A. Just to keep us advised of what is happening.

Q. Yes; but I mean, your land records, that is the way the Correction Memorandum went into your land records?

A. That is right; and we posted it immediately.

Q. And it says it is withdrawn?

A. It was withdrawn as of that date. [70]

Q. Did you know that this letter was going to Washington asking Washington to withdraw it?

A. Well, I did surmise that it was going there; sure. I didn't get it until a week or so later, but it is in our records down there.

Q. This letter?

(Testimony of Chester M. Archbold.)

A. That letter; sure. We have a copy of it.

Q. So, at the time you knew that the Chief Forester said he withdrew it he was writing Washington, asking Washington to do that very thing?

The Court: Well, I think—what I am interested in is not what appears to be an irregularity but what I am interested in is what act is it and on the part of whom that results in the withdrawal or reservation and whether or not the order withdrawing an area or reserving it relates back to the time of some administrative action.

Mr. Davidson: I think that that is a matter of law, your Honor, and I am quite prepared to argue that it does not and cannot.

The Court: Well, I am interested in hearing that before—I am interested in hearing of any irregularity like this. For instance, if an order reserving an area relates back to the time of the administrative action of the kind described here, well then it is immaterial that there is an apparent irregularity. [71]

Mr. Davidson: That is right. But the point, your Honor, is that it doesn't, and one of the very sound reasons why it doesn't——

The Court: Then you better examine him as to what is the act that finally consummates the reservation or withdrawal.

Q. (By Mr. Davidson): Do you know what is the act that finally consummates the reservation and withdrawal that was involved here?

A. Well, as far as I am concerned, the Correc-

(Testimony of Chester M. Archbold.)

tion Memorandum No. 11 stands as far as I am concerned down there in administering it. The final withdrawal was naturally when the Department of Interior withdrew the area.

Mr. Davidson: I think these two points come together as to this policy, provisions in the Bureau of Land Records, in that the local departmental officers apparently take the position that a Correction Memorandum by the Forester does reserve the land and from that day forth will keep mineral claimants out. It is, I believe, the law that the Secretary of the Interior's action is what does that, and there are innumerable slips between the cup and the lip there, which is a very sound reason for not permitting this sort of regulation to affect a mineral entry because, as you can see, it might go on for years.

The Court: Well, it all depends on what act it [72] takes to make the withdrawal reservation effective.

Mr. Davidson: That is right.

The Court: Well, then, when we determine that, all we need to do is determine the date when that act was performed.

Mr. Davidson: I agree with that, and I don't see how——

The Court: Well, then, let's get to that instead of all this intermediary stuff.

Mr. Davidson: Well, I don't see how I can prove it by evidence except other than the law.

The Court: Do you mean there isn't any proof

(Testimony of Chester M. Archbold.)

here of the act that you contend is what it takes to make a reservation?

Mr. Davidson: Well, they haven't proved it and they don't have to prove it. We admit an act of reservation some five or six weeks subsequent to our mineral entry. That was a proclamation by the Secretary of the Interior which withdrew thirty-seven and a half acres of land, not however—again a point to show that earlier acts are not effective—he did not withdraw it quite in the fashion requested by the Forestry Service. It is a small discrepancy.

The Court: Well, what is there to show the effective date?

Mr. Davidson: It is dated, I think, on its [73] face, as published, July 20th. I believe it was signed by Secretary of the Interior Chapman on July 25th.

The Court: When was it to take effect, on publication or issue?

Mr. Davidson: Publication, your Honor.

The Court: Well, then what is the use of going into this? If that is your position, just call attention to the fact that the reservation or the act of reserving it wasn't made by the Secretary until such and such a time.

Mr. Davidson: Well, the point is, your Honor, the Government has claimed all of these various alternatives. It seems to us we have to meet them all.

(Testimony of Chester M. Archbold.)

The Court: But the way to meet them is by showing what the Secretary did.

Mr. Davidson: Well, yes, your Honor; but what the Secretary did had nothing whatsoever to do with the classification as a recreation area, for instance. All I am trying to show is that this reservation, which is a separate allegation of the complaint and specifically mentioned as a particular reservation by Government counsel, is merely one step leading up to a reservation by the Secretary of the Interior, and that is what I was trying to show by these letters, that it is just such a step and has no independent force or effect of its own unless the Government——

The Court: Well, isn't that a matter of argument? [74] You can argue that at the completion of the case.

Mr. Davidson: It is a matter of argument to argue that the Correction Memorandum, which says on its face that the area is reserved, is only a step leading up to it. But I would like to show here that as the Forester was issuing that Memorandum he was sending a letter to Washington asking for this regular routine procedure.

The Court: As I say, I am not interested in what somebody wrote to Washington. I am interested in when the order or whatever it takes to make a withdrawal effective was done.

Q. (By Mr. Davidson): Do you know when that order was effective, the Secretary of the Interior's order?

(Testimony of Chester M. Archbold.)

Mr. Baskin: Well, your Honor, that is a matter of record which the Court can take judicial notice of in the Federal Register.

The Court: Yes. If it is in the Federal Register, all you need to do is to ask the Court to take judicial notice of it if it hasn't already been stipulated.

Mr. Stump: I think we did stipulate on it. It shows in the pleadings.

Mr. Baskin: Here is a copy.

The Court: Then that is all that is necessary. You have got all that you need in the record now to make the point on argument that you referred to a moment ago. [75]

Q. (By Mr. Davidson): In going back to this classification as a recreation area, this area was classified as a recreation in 1940, but no further money was spent on it for recreation use?

A. None, other than visitation by our forest guard to clean up the area and watch out for forest fires.

Q. It is recreation use, is it not, that it has been listed under?

A. It was to a certain point until we decided that the gravel was needed to develop other recreation areas and recreation roads. All of our minor roads have a recreation classification also.

Q. What I am trying to get at, is this area at the moment a recreation area, gravel pit and reservation for the Bureau of Public Roads all at once?

A. It is by various stages from 1940 to 1951.

(Testimony of Chester M. Archbold.)

Q. Well, at what point did it lose its character as a recreation area and become a gravel area?

Mr. Baskin: Well, I object, may it please the Court.

The Court: Well, what I am wondering about, is there any necessary consistency between the remainder of the area aside from the gravel pit that could not remain a recreation area? In other words, the fact that there is a gravel pit somewhere in the middle or anywhere in a recreation area [76] would not deprive the remainder of the recreation area of its classification, would it?

Mr. Davidson: No, I don't believe it would, your Honor, but, I think, the point I am trying to make here is that the reason, the only reason, I believe, that this area was classified as a recreation area was to prevent its mineral entry, and I think the facts here now show that there is absolutely no conflict between our mineral claim and forest purposes, that is, the protection of timber, the protection of any of the things that the Forest Service protects.

The Court: But that is a matter for argument. In other words, that is a matter of law.

Mr. Davidson: That is right. I just want to clear up this public service site recreation as alleged as a public service site.

Q. (By Mr. Davidson): These are the regulations as they now stand. They came out in the 11 Federal Register, and I presume you have followed

(Testimony of Chester M. Archbold.)

them since they were issued as far as recreation areas, public service——

The Court: You don't mean Federal Register, do you?

Mr. Davidson: Federal Register; yes.

The Court: I thought you had there a volume of the Code of Federal Regulations.

Mr. Davidson: It is the Code of Federal Regulations; yes; but it was originally issued—— [77]

The Court: But they are distinct publications, and to keep confusion from creeping into the record you better call it——

Q. (By Mr. Davidson): All I was saying is, this is the existing code and as revised by printing in the 11 Federal Register and that has governed the administration of that area since the publication of this regulation, has it not?

Mr. Baskin: Well, may it please the Court, I might state, and I will object for this reason, that the regulation that existed when that was set aside is not the same regulation as it is now under the Code of Federal Regulations. That is why I amended the complaint.

Mr. Davidson: I would quite agree with that. I think it was in 1944 this 11 Federal Register made the regulation as it is, and since which time I want to know whether they have been following that regulation as to recreation use for this ninety-one acres under this regulation.

The Court: Suppose you prove that they did or didn't, how would it contribute to the solution of the question here in this case?

(Testimony of Chester M. Archbold.)

Mr. Davidson: I think, well, for one thing it would show that this recreation—if it is anything, it is a recreation area and not a public service site, so that those two classifications are entirely distinct now.

The Court: And suppose you prove that, then what? [78]

Mr. Davidson: If it is a recreation area, I think that the manual of forest regulations will show that that classification was for the purpose of preventing mineral entry and not for the purpose of recreation.

The Court: Well, then, so what?

Mr. Davidson: So, your Honor, this, I believe, is a court of equity at least. At least I think if we come in with a claim as to recreation use and we prove that the Forest Service didn't intend it to be used for recreation at all but did it merely to prevent mineral entry, I think that their case falls on that ground at least.

The Court: Well, you can ask him what their intention was.

Q. (By Mr. Davidson): What was, your intention was, I think, as you have repeatedly said, this 1940 classification, to create a recreation area?

A. That is right. We planned that from about 1935 right on through as a recreation area.

Q. How is a recreation area defined now?

Mr. Baskin: Well, may it please the Court, I don't see—that would be a matter of law or regulation——

(Testimony of Chester M. Archbold.)

The Court: Well, I think it is immaterial how it is defined anyhow.

Mr. Baskin: ——and we object.

A. It is any place that anybody wants to carry on a recreation, [79] I imagine.

Q. Handing you these regulations, those are the regulations and part of the forest manual, are they not? A. They are; yes.

Q. Now, I want to ask you if this is the regulation U-3 B concerning recreations areas; is it not?

A. Well, I didn't look at it too closely there. You turned it over now. What I looked at was wilderness area on the front.

Q. I am sorry; yes.

Mr. Baskin: If he is referring to the present regulations, they are in the Code of Federal Regulations there, and there are two sections to, I think, the regulation he is referring to.

Mr. Davidson: The witness has now said it has been recreation use under either the former or the subsequent, and it is not a public service site, that is, as defined by the regulations.

A. I take exception to that. Any recreation area that we use is classified as a public service site to begin with.

Q. (By Mr. Davidson): Right now?

A. Certainly. Every one of our campgrounds is a public service site. The public uses it. We provide service for the public on these public service sites.

Mr. Davidson: This is not very material, [80]

(Testimony of Chester M. Archbold.)

your Honor. I just want to avoid confusion between the terms recreation and public service.

The Court: Well, but I am not interested in obviating confusion between the two unless it becomes material to do so.

Mr. Davidson: Well, it becomes material to do so, I think, only in the sense of this part of the Forest Service Manual.

Q. (By Mr. Davidson): Now, this section is the regulation U-3 B which is the classification for a recreation area, is it not?

A. I will look at it and see. U-3 B; yes, that is a part of the regulation.

Q. It says here "regulation"——

Mr. Baskin: Just a moment. May it please the Court, unless he shows the materiality of that regulation to some point he is trying to bring out, I am going to object to it. I don't see any relationship at all to what has been said as to what that regulation means.

Mr. Davidson: Let me add this then.

Q. (By Mr. Davidson): Doesn't it also refer to classification as public service sites such as for restaurants, filling stations, stores, horse and boat liveries, so it applies both to public service sites and to recreation areas, doesn't it? [81]

A. It does; yes.

Q. It goes on to say, "Regulation U-3 affords the maximum protection against mineral location which the Secretary of Agriculture can do——

(Testimony of Chester M. Archbold.)

Mr. Baskin: I object to anything further along that line, your Honor.

Mr. Davidson: I had not quite finished it.

The Court: Well, he may finish his question.

Mr. Baskin: Very well.

Q. (By Mr. Davidson): ——and classification thereunder is desirable for all recreation areas, developed or potential, which are not mineralized areas in national forest lands withdrawn from the public domain." Now, I take it that that is part of your operations when you act on that word from the Secretary of Agriculture, do you not?

A. Yes, I do.

Q. Were you acting—was this classification order of 1940 in any way based on that statement?

Mr. Baskin: Well, now, may it please the Court——

The Court: As I read that, that recommends, you might say, to the administrative officers that action of a certain kind be taken or they recommend or point out that action of a certain kind is a protection against the appropriation of land under the mineral laws.

Mr. Davidson: It is not quite that. [82]

The Court: All right. And now, so what?

Mr. Davidson: Well, it recommends this particular classification as the most desirable.

The Court: Well, but what is wrong about it if they follow it?

Mr. Davidson: Well, because among other things mineral lands are reserved from sale by Congress,

(Testimony of Chester M. Archbold.)

which means that they are open to entry by Congress and there are only two people in the United States that can stop that and one is the President and the other is the Secretary of the Interior. I think that it is neither right nor proper for such officers, or not such officers—they are only following the regulations that the Secretary of the Interior gives them, but that regulation, I think, manifestly goes beyond the power and authority——

The Court: That is all a matter of argument, but so far as examining the witness about it——

Mr. Davidson: I just wanted to find out if in any way he acted on that.

The Court: I am pointing out that, if he did, it wouldn't have any probative value here. It would just simply probably get you some additional force for your argument on that point; that is all; but you have that anyhow without questioning him on it.

Q. (By Mr. Davidson): One more question. This withdrawal, [83] that is the method which was ultimately adopted to withdraw this land from mineral entry, was it not? A. That is right.

Q. That is part of the same regulation?

A. That is the same.

Mr. Davidson: I offer this as Defendant's Exhibit 1.

Q. (By Mr. Davidson): One further point——

Mr. Baskin: Wait just a minute. May it please the Court, I am objecting to the introduction of that.

(Testimony of Chester M. Archbold.)

The Court: What is the purpose of the offer?

Mr. Davidson: Your Honor, you can't take judicial notice of that paragraph because it is not a regulation. I must have it in the record somewhere to make any argument, as you point out.

The Court: Well, that is part of the regulations of the Service itself or the Department?

Mr. Davidson: No. It is part of the Forest Service Manual which includes regulations and a number of other things.

Mr. Baskin: It is just a statement in the Forest Service Manual; that is all in the world it is, an opinion of some man in the department. He may be a lawyer; he may be just a civilian. It is an opinion for their guidance.

The Court: The only thing it would prove is that [84] they have a policy of, you might say, discouraging mineral entries, and that is, as I have intimated before, of no evidentiary value here on the questions involved.

Mr. Davidson: You can only argue law from the facts, your Honor, and one of the arguments here is of course that these acts are all in excess of authority of the Forest Service.

The Court: You may argue that without having that in evidence.

Mr. Davidson: Except, I think, your Honor, it is pertinent to our argument to show that the regulations themselves show that. The language itself is significant, and it also shows the dangers of allowing this sort of an administration.

(Testimony of Chester M. Archbold.)

The Court: Well, you want to get now into a political question, it seems to me.

Mr. Davidson: Well, I think that underlying all of our mining and forest law it is ultimately a question of——

The Court: You can argue the fact that this land was open to mineral location regardless of what local regulations there might be or what the manual says.

Mr. Davidson: I will say one more thing then.

Q. (By Mr. Davidson): This circular letter, are you familiar with that?

A. I have it in my file; yes. [85]

Mr. Davidson: I will merely offer this in evidence to show that the Forest Service has now abandoned the policy that they set out there.

Mr. Baskin: I object.

The Court: Objection is sustained to that. There is no use cluttering up the record with that. I think we will adjourn at this time.

(Whereupon Court adjourned until 10:00 o'clock a.m., January 26, 1952, reconvening as per adjournment, with all parties present as heretofore; whereupon the witness Chester M. Archold resumed the witness stand, and the Cross-Examination was continued as follows):

Mr. Stump: Just a few questions.

Mr. Baskin: Well, may it please the Court, I think there is a rule against two attorneys examining the witness, isn't there?

(Testimony of Chester M. Archbold.)

The Court: I think there is.

Q. (By Mr. Davidson): Yesterday, Mr. Archbold, we discussed that map there. That is a map that the Bureau of Public Roads sent to the Forestry Service. That was revised in November. Will you tell what those revisions were? That is the map as it exists now. It is not the one that the Bureau of Public Roads sent.

A. The original one; no, it is not.

Q. And there are several changes. I want to say right at [86] the outset that we admit that the exterior lines are the same.

A. The exterior lines of the thirty-seven and a half acres are the same, but the stream is slightly to the southeast of its location on the original map.

Q. And the original map had no designation of gravel road on it?

A. That I couldn't say. I would have to see the other map.

Q. I will have to get the other map. Can you produce that other map?

Mr. Baskin: Well, may it please the Court, does that make any difference whether or not the other map showed the road? It would be a fact of whether or not the road was there, which the witness can testify to.

Mr. Davidson: It is a small point. I don't like to leave a map with the road platted on it with the implication that that was what was prepared prior to this suit. I think there is no question that that gravel road——

(Testimony of Chester M. Archbold.)

The Court: Well, it seems to me that we are exploring too much into little irregularities that make no difference here, and of course they are time-consuming.

Mr. Davidson: Well, I don't want to be time-consuming, but, if it is the fact that either the Bureau of Public Roads or the Forest Service added that designation, gravel road, I believe sometime in November and certainly [87] after this suit was brought—and that is all I wanted him to say.

The Court: Well, but what would that tend to prove or disprove?

Mr. Davidson: It would tend to place no reliance on the map as being a designation of a particular area used.

The Court: Well, but it hasn't been introduced in evidence.

Mr. Davidson: Yes, it has, your Honor, as part of the admissions. We admitted that that map was correct as to its exterior lines, and I just want to show that its interior——

The Court: I didn't know that that was ever introduced.

Mr. Davidson: Well, it is part of the admissions. The plaintiff requested that we admit it, and we did.

The Court: Has that particular sketch been identified in the admission?

Mr. Davidson: Yes.

The Court: How?

Mr. Davidson: It is attached to the admission.

The Court: You mean there is a copy of it?

(Testimony of Chester M. Archbold.)

Mr. Davidson: That is right. There are duplicates of it.

Mr. Stump: It is material further, your Honor, on that point because they have claimed the road as a development [88] and that map is incorrect as to the road, and that is why it is pertinent at this time.

The Court: Well, it is not whether it may be inaccurate in some respects but whether or not the road existed.

Mr. Davidson: Yes, sir; other than the fact that it is on a map is, I should say, some evidence at least that it existed. Mr. Archbold pointed out to it yesterday as existing at that area. We used that map for that purpose.

The Court: Well, do you want to show now that it doesn't exist, or what?

Mr. Davidson: I want to show first that that survey—yes, I definitely want to show that it does not exist as shown on that survey and among other things that that survey was prepared long after that road was placed on that survey, long after this suit was brought.

The Court: That is just what I am getting at, is, so long as the road exists, what difference does it make that it doesn't exist exactly in the way it has been portrayed?

Mr. Davidson: It is a lot more than that, exactly as portrayed; it is very much.

The Court: Well, so let's say that it substantially differs. All right; then what is the effect of that; what is the legal effect of it?

(Testimony of Chester M. Archbold.)

Mr. Davidson: Well, the legal effect of that is there couldn't be any appropriation of the land despite the [89] fact that it is marked on a survey. Ordinarily one of the best evidences of what land is the area of land that has been used as a survey that purports to be a survey.

The Court: Well, but a roadway, as it exists on the land that is involved in a controversy of that kind, is a roadway with everything that it is entitled to so far as legal implication is concerned, regardless of the fact that it may not be accurately portrayed. Now, what I am getting at is it would make a lot of difference if the roadway wasn't there at all and they showed it as being in existence, but, if it is admitted, as it appears to be, that the road was there but that there was some inaccuracies in portraying it, what difference does it make?

Mr. Davidson: Very well. I will go on to the character of the road itself then.

Q. (By Mr. Davidson): How far did trucks travel and how far could they travel along any developed roadway area?

A. Trucks at times could go within three hundred feet of the discovery point.

Q. That is southwest of it?

A. Yes. That is up to the upper limits of what is shown as a road there. Up to within three hundred feet of the discovery point.

Q. Now, you say "at times." What do you mean by that?

A. At times, the upper end. We had no reason

(Testimony of Chester M. Archbold.)

to go much with [90] trucks beyond the gravel bunker, the loading ramp. And at times, when it was necessary for the dragline machines to move farther up, why, it was a very simple operation to make a road with a bulldozer that a truck could go on. All they would have to do is level off the ground. It was all hard gravel so it was no problem at all. You can go any place on that north side of the stream with a very small amount of work to make a good road even after the stream has had its high-water stages.

Q. In other words, a truck can drive virtually anywhere up there?

A. I didn't say that. I said that it could along that road that has been traveled. You couldn't get up in the timber. It would be impossible to go up in the timber.

Q. Well, I was just trying to determine what was done to let the trucks—what by way of establishing a road was done? You mean a bulldozer went first and then a truck followed?

A. The bulldozer went over it sufficiently to make a road, like any place. Bulldozing a road, that is a common term.

Q. Well, you just said it is all hard gravel up there and they could go anywhere along the north side of the stream.

A. That is right; along where the roadway was built. Sure, it has hardpan underneath that has never been disturbed even by high water. It seldom

(Testimony of Chester M. Archbold.)

cuts far into that north side because we didn't remove the gravel underneath that [91] road.

Q. I suppose what you mean is that there were stumps that had to be removed here and there and something of that sort? A. That is right.

Q. Now, do floods ever cover that land with debris again now?

A. It does at high-water stages, but not every point of the road.

Q. What I am getting at is that roadway was once cleared of debris for some purpose; since that time, and I suppose all during that time, high water covers it with the same sort of debris all over again?

A. Well, not to the same extent because they removed so much of it.

Q. Yes, but some difference perhaps in character. But it could be covered with a log situation; it could have been covered with a log at any time. The building of that was removing the logs or stumps?

A. Well, if you want to know whether you could travel up there with a car, I could say that in all the time we had possession of the pit you could drive a Pontiac sedan to the log loading ramp at any time up until the time that the barricade was put in. After the barricade was put in I couldn't do it.

Q. To that extent you could drive a car while you were in [92] possession of it. That log loading

(Testimony of Chester M. Archbold.)

ramp was about the middle of the twenty-acre claim?

A. No. Slightly above the middle of it.

Q. That road, the contractor finished using that road in December of 1950, did he not?

A. That is when he moved his dragline equipment out.

Q. That is right. Did the Forest Service do any maintenance of that road thereafter?

A. It was not necessary to. I had witnesses that I have driven up there a number of times. I have driven Mr. Wyller, Mr. Stoddart and others.

Q. I just want to ask you now, did the Forestry Service do any maintenance on it after December?

A. It was not necessary to.

Q. Well, you didn't do any? A. No.

Q. The Bureau of Public Roads didn't do any?

A. I couldn't say as to that.

Q. Well, you said a lot as to what they did before by way of taking gravel out.

A. I know that to be a fact, but as to their maintaining it I cannot answer that question.

Q. Now, in the wintertime—the spring freshets bring vast quantities of gravel down?

A. After every freshet. [93]

Q. And debris? A. Some debris.

Q. And washes out stumps from far up this area?

A. No. Not from far above; no. There is too much other debris to hold it back.

Q. Logs and all sorts of debris come down that stream, don't they?

(Testimony of Chester M. Archbold.)

A. Only that material that our contractors disturb in cutting and bucking into logs is all on our area.

Q. Well, what I want to ask now is, in the spring of 1951, were there any logs, boulders or other debris on that road at any point between the Tongass Highway and the log bunker?

A. As I say, up until the time the barricade was put in I could drive a sedan without any difficulty to the log ramp.

Q. When did you do that, before or after June 21st?

A. Before and after; until the barricade was put in.

Q. I am not concerned with after because I know why that was possible to do it then. I am concerned with before. I just want to find out when you drove up there between December 30th and June 21, 1951.

A. The mere fact that Mr. Schaub pulled a trailer in there at the time he barricaded it——

Q. That is quite true. [94]

A. ——he could get that in there and out without any trouble.

Q. That was after June 21, 1951?

A. That is right.

Q. I want to know the situation between December 30th and June 21, 1951. Did you ever drive on that road during that period? A. I did.

Q. All right. Do you know what date you drove on that road?

(Testimony of Chester M. Archbold.)

A. I can back it up with entries from a diary which I do not have right here now.

Q. Well, you don't remember whether you did or not? A. I do remember; certainly.

Q. You definitely drove a car?

A. A sedan.

Q. Up to the bunker? A. I did.

Q. I mean the ramp.

A. At least two or three times.

Q. And you don't remember whether that was in December—was it in the early part or after?

A. Oh, I would say it was sometime in May or June, or April, May or June, 1951, and possibly in July.

Q. I am not interested in anything after the date——

A. Well, I will tell you—I have a picture here of the sedan parked in front of the log ramp after the claim was staked. [95]

Q. After the claim was staked I know why you could get up there because Mr. Schaub cleared that way to get up there himself. But I want you to say when you drove that sedan up there.

Mr. Baskin: May it please the Court, I think he has answered that—"April, May or June, 1951." He answered that question.

The Court: It seems to me it has been gone over.

Mr. Davidson: I just want to make sure that he has no clear recollection as to the date. It is my feeling, your Honor, that these freshets periodically

(Testimony of Chester M. Archbold.)

wash out or cover that road and can at any time and frequently do, and it is quite possible that——

The Court: I think he has already shown his inability to remember any specific date.

Mr. Davidson: All right.

Q. (By Mr. Davidson): Now, let's get to this log loading ramp. What is that made out of?

A. It is made out of spruce logs.

Q. How many logs are there; do you know?

A. I can figure it out by looking at a picture probably.

Q. I may save time.

A. I have a copy of it. Oh, there is at least eight or ten. There is some concealed by the ramp.

Q. That ramp was built in 1949, was it not? [96]

A. It was built by Mr. Almquist during his contract which was approved—it is immaterial whether I can remember these dates.

Q. I just want to get some idea. I don't care about the date.

A. On October 25, 1949. I believe that he did build it in one of his first operations.

Q. And you testified yesterday that he left it there because you asked him to leave it there for your use? A. Yes.

Q. Does the Forestry Service have a bulldozer?

A. We certainly have.

Q. When did you get that bulldozer?

A. We have had bulldozers——

The Court: I think it is immaterial when they got it.

(Testimony of Chester M. Archbold.)

A. We have had bulldozers since 1933 that I know of.

Q. What maintenance did the Forestry Service do on that log loading ramp?

A. We did none.

Q. You didn't maintain it at all?

A. Not ourselves; no.

Q. Did anyone ever use that log ramp after Mr. Almquist left? A. That I cannot say.

Q. You don't know of any other use of it [97] ever? A. No, I don't.

Q. I want to ask now about this Correction Memorandum No. 11. Is that the type of memorandum that the Forest Service issues on homesteads?

A. No.

Q. When you relinquished it from the national forest? A. No, it isn't.

Q. What are the other Correction Memorandums? This is No. 11.

Mr. Baskin: Well, your Honor, I object to that. That is going into matters that are irrelevant and immaterial. The only thing that is in issue here is that thirty-seven acreas of land described in Correction Memorandum No. 11, and any other memorandums that they issued has nothing to do with this case.

Mr. Davidson: I am trying to eliminate the ninety-one-acre point from controversy, your Honor, because, if this is a relinquishment or a change from Forest Service control, it seems to me that it can no longer be classified as ninety-one acres. That dates

(Testimony of Chester M. Archbold.)

as of February 9 the ninety-one acres and for that reason as well as many others would be immaterial to this case.

The Court: You may ask him about that.

A. To answer that, we have a lands plan for the development of the land resources of the Tongass Highway. That plan is the original. [98]

Q. (By Mr. Davidson): I think you have answered my question when you said that it is not the same as the elimination for a homestead. How do you go about eliminating land from the national forest for a homestead?

Mr. Baskin: Well, may it please the Court, I object to that. That is getting into matters that are not in issue.

The Court: I don't see the materiality of that.

Mr. Davidson: Very well.

Q. (By Mr. Davidson): Who now controls the land, that thirty-seven acres? Is it under the jurisdiction and control of the Department of Commerce?

A. No. It is still national forest land.

Q. Then, I just want to be absolutely certain about this one thing. Is that land now classified both as a recreation area—I am speaking now of the thirty-seven acres——

A. We have not changed the designation of the ninety-one and thirteen hundredths acres. We consider that as the original public service site.

Q. I grant that you haven't changed it on your records yet, but do you regard it with this issuance

(Testimony of Chester M. Archbold.)

of this Correction Memorandum as now a part of a recreation area?

A. I consider it as a part of the recreation area.

Q. And it has been despite that February 9th memorandum?

A. It is still—when we make plans for such a recreation area to start with, we have a vision of possibly improving [99] it by building roads, taking out gravel, building a swimming pool and picnic areas. As I have already testified, every Sunday the people use it as a recreation area. We encourage them to do it.

Q. I am sure you encourage people to go into the national forest. I am just wondering how an area which you testified, or counsel in his opening statement testified, will shortly be torn up and over one hundred thousand cubic yards of gravel has to come out of there, counsel said—now, I just cannot see how a swimming pool or picnic tables or trails or any other single thing you mentioned can be economically useful or properly operated through an area out of which one hundred thousand cubic yards of gravel is coming. It puzzles me, and I want to know.

Mr. Baskin: I think that is argument he could make to the Court.

The Court: Isn't that a good deal like, if this were an ordinary mining case, controversy over a claim, you would ask a party why he resorted to one method of mining rather than another?

Mr. Davidson: Well, no, your Honor. I think

(Testimony of Chester M. Archbold.)

there is a conflict between use by the public and use to extract——

The Court: But it isn't enough, as I have said time and time again, to point out an inconsistency or conflict unless it has some bearing on the issues here, and I don't see [100] how it has any bearing.

Mr. Davidson: The bearing on the issue is, if there is a conflict, it seems to me the conflict eliminates from the case this recreation area designation.

The Court: Well, that is something you may argue.

Mr. Davidson: That is all. Your Honor, before redirect examination I would like at this time to make a motion to strike out paragraph four of the complaint for the reason it is irrelevant to this case and I could give some brief reasons but I would like to give the specific reason that compels me to do it this time.

The Court: Well, now——

Mr. Baskin: Of course, the motion is untimely, may it please the Court.

The Court: This paragraph four, it seems to me, has been admitted.

Mr. Davidson: It has been admitted. There was a designation of that area, but there has not been an appropriation of the land. I could argue, I suppose, that allegation is a conclusion of law. We admitted the facts stated. The particular point I want to point out to your Honor is, if that allegation is material and relevant, I believe——

(Testimony of Chester M. Archbold.)

The Court: You better designate or specify the allegation.

Mr. Davidson: Paragraph IV. "The 37.5 acres of [101] land described in paragraph III were and now are a part of 91.13 acres of land, more or less, set apart and appropriated——

The Court: I don't see that in Paragraph IV. It is not in what had been added. Go ahead.

Mr. Davidson: It raises this particular problem and did yesterday, in that, if that is relevant, that appropriation, as a legal appropriation of land to the Forestry Service use, I think that the policy of the Forest Service is very relevant to this case in that a proper legal argument can always be effect of a decision. That argument is the basis of why I want to put in the Forest Service policy, and it is not for the purpose of questioning anyone's good faith, rather it is for the purpose of showing their good faith. I honestly believe that this regulation was made in good faith under the policy that the Forestry Service has.

The Court: Well, I am having difficulty in following you. Now, you started out talking about an allegation and then you drifted onto policy.

Mr. Davidson: Your Honor, you excluded yesterday these regulations as to the policy of the Forestry Service in designating, appropriating, public service sites, recreation areas. Now, there is no way for me to establish the legal argument that I wish to make on the policy of the Forestry Service as constituting a complete reversal of the [102]

(Testimony of Chester M. Archbold.)

mining laws unless I have evidence of that policy in the record. Now, the only evidence of that policy that I can have, other than my own belief, is what the Forestry Service says its policy is. It is not a question of good faith of anyone but as to the policy which I think is going to be put to that issue.

The Court: Well, as I understand it, you contend that the policy, as referred to here yesterday, has been incompatible with the spirit at least of the mining laws.

Mr. Davidson: Not only the spirit but the letter, the letter and the spirit of the mining laws.

The Court: Well, then after you have shown that, so what?

Mr. Davidson: Well, that is a legal argument, your Honor.

The Court: Well, but what value is the legal argument? I just don't see where it would have value in this case.

Mr. Davidson: Well, if it has no value in this case—I have to have something on which to base my legal argument on, your Honor. If I haven't got any basis for it, I have lost my legal argument.

The Court: Well, but what I am calling attention to is I am questioning what use you could make of it even though you could establish it. [103]

Mr. Davidson: I can use it as the basis for the legal argument that the result of a decision on this point which would be unprecedented, your Honor, and would have far reaching and very unwarranted results against the spirit and letter of the mining

(Testimony of Chester M. Archbold.)

laws; now, that, I believe, is the persuasive argument if not a conclusive one.

The Court: Well, I can see where you can criticize and censure, if you wish, the Forest Service for having a policy of the kind but, so far as showing me how it could possibly be involved in any question before the Court, I can't see it.

Mr. Davidson: Well, if the Court was going to decide on this issue, I think the Court should be aware of that policy of the Forestry Service.

The Court: If I am aware of it, then how does it affect the determination of the question?

Mr. Davidson: You are aware of it as I have spoken it, but it is not argumentative, that policy. It is set out in those regulations, and that is the sole purpose I wish it in for. If this paragraph of the complaint is relevant to the case, I believe that argument is relevant to the case, and the only evidence that I can bring forth to support that argument is in those regulations.

The Court: Well, but you don't get my point. My point is, suppose you prove everything you want to prove, and [104] that would amount to, as I get it, that they have a policy that is incompatible with the spirit of the mining law.

Mr. Davidson: That is right.

The Court: Then my point is, my question is, suppose you have proved that, then what have you proved so far as the solution of any of the questions presented here?

(Testimony of Chester M. Archbold.)

Mr. Davidson: A decision which would result in an absurd result should not be made.

The Court: I don't know what kind of a decision you are referring to. A decision of what?

Mr. Davidson: A decision of this Court that a designation of an area appropriates the land to Government use or that it bars a mining claim, whatever you wish. A decision of that point, I believe I can demonstrate through the use of this Forest Service policy, would result in mining laws of all national parks being suspended by the judgment of the regional forestry. Now, that, I believe, is an absurd result, and I think the Court should have the benefit of that argument, and the basis of that argument is not that I say so but that the Forestry Service says so.

The Court: Well, but it seems to me that whether or not there has been such an appropriation or reservation of the land here, as would preclude a mineral entry, does not depend on the Forest Service policy. It depends on what they did that would preclude location under the mining laws. [105]

Mr. Davidson: I will grant, your Honor, that is right, but, if that is right, then I believe this paragraph is irrelevant, and that is why I move to strike it.

The Court: Well, the motion is denied at this time.

(Testimony of Chester M. Archbold.)

Redirect Examination

By Mr. Baskin:

Q. Now, Mr. Archbold, yesterday you testified—I believe counsel read to you or had you read a paragraph in Mr. Berg's contract. Now, state whether or not that contract also provided that the borrow material would be removed from Whipple Creek gravel pit?

A. That is right; the contract does.

Q. And did it provide that the gravel will be removed from an area that is now claimed by the defendant? A. That is right; it does.

Q. When you examined the boundaries of the defendant's claim, will you tell the Court now just the terrain and the nature of the timber that existed around his boundary there?

A. At the lower part of the claim there is big spruce.

Q. Well, I mean generally. Is it heavy timbered land?

A. It runs from heavy to sparse over on the right-hand side where it passes through some scrubby muskeg. The rest of it was originally heavy hemlock spruce. There are some [106] trees there that will range as high as five feet on the stump, a few of them.

Q. And are there a lot of windfalls all through the area along the line where his stakes are?

A. Along the north side there are windfalls at the upper end of his line, and the lower end of it is in heavy timber.

(Testimony of Chester M. Archbold.)

Q. Isn't there a lot of underbrush all over the area?

Mr. Stump: Just a moment please. I am going to object to the form of these questions. Mr. Baskin, every question is leading that you have asked here so far.

The Court: Well, of course, the objection to leading questions does not obtain so much where there is no jury and where the witness is an intelligent witness. This witness is not the kind that is going to be led into saying something that isn't a fact merely because the form of the question is leading. While you may or perhaps should refrain from asking leading questions, if it is a question that cannot be framed except in a rather roundabout, indirect way and one that takes a lot of time, why, you may ask it in a more or less leading form.

Mr. Baskin: I was just trying to save a little time, may it please the Court.

Q. (By Mr. Baskin): Describe the terrain around the boundaries of the defendant's claim.

A. As you take from Corner 4 to Corner 5, that is the northwest [107] boundary, it is off to the left of the stream bed, and it commenced to get into little rolling humps along there. The south boundary, Corner 3, is the highest point on the claim probably. That may be questionable at that. But it is up on the side hill, higher than the rest of the valley. It must be thirty feet in elevation above the stream bed.

Q. Well, has that area, which is covered by his

(Testimony of Chester M. Archbold.)

claim, been cut by the stream in various places as it meandered through the years?

A. Through the years the main portion of the stream cut to the north. There is evidence of a side stream cutting off, well, almost, well, as far as the claim line on the north side there.

Q. Now, when the Forest Service set this land aside on the 9th of February, 1951, for the use of the Bureau of Public Roads, was that for their exclusive use, or was that for both the Bureau of Public Roads use and the Forest Service use?

A. For the use of both agencies; yes.

Q. You mentioned a while ago that trucks could go up within three hundred feet of the defendant's discovery post. Now, has equipment been used in removing that gravel any closer to the discovery post than the three hundred feet that you just mentioned? [108]

A. A bulldozer came within fifty feet of the discovery point and cut a corner of the stream bed, made a right-angle turn, and it cut it crosswise to change the course of the stream to develop the bank. Along the south side of the stream at several places the bank is sheer from the upper bank to the floor of the gravel on the stream bed, as much as fifteen to eighteen feet high. That was developed by the contractors swinging the stream back and forth to help develop it, wash the gravel, the fine sand, the clay and the overburden out so we would have washed sand and gravel for our road.

Q. And in loading that log ramp did the con-

(Testimony of Chester M. Archbold.)

tractors or the operators of the machine, did they operate between the log ramp and the defendant's claim?

A. You mean, and the upper boundary of his claim?

Q. Yes. I mean and his discovery post, I meant.

A. That is right. He would take his bulldozer back there and start shoving down the elevation—he wanted gravity—a little ways so he would shove it down and up onto the ramp and load his trucks that way.

Mr. Baskin: No further examination. You may be excused.

Mr. Davidson: Just one moment. [109]

Recross-Examination

By Mr. Davidson:

Q. You said this stream has meandered over the years for its various courses? A. That is right.

Q. That has exposed a great deal of gravel over this whole claim?

A. I don't believe that it exposed a great amount of gravel there except now that it has cut down so deep. There are, as I say, old stream beds to the north that swing off. You can see the route of the stream, and off to the right there is one short cut across there that has gravel showing in it below the discovery point.

Q. Now, I just wanted to again clarify the area of heavy timber on the boundary line of the claim. Where was that heavy timber?

(Testimony of Chester M. Archbold.)

A. The heavy timber is down at the lower end of the claim on both sides of the creek.

Q. That is one of the north and south lines? I just want to clarify which line that is. You said two of them were clear. Is this one of the ones that is clear, the one that went through the heavy timber? A. I don't get the question.

Q. You said you had no difficulty tracing two lines. Now, I want to know if this line which runs through the heavy [110] timber is one of the lines once you had difficulty tracing?

A. That is right. I did not——

Q. That is all I want to know about it. Now, this bulldozer came within fifty feet of the discovery post. What date was that, that bulldozer went up there?

A. If he built his log ramp shortly after this contract——

Q. Almquist's contract?

A. Almquist's contract.

Q. And in 1949?

A. '49 and the spring of '50.

Q. Do you know how long the bulldozer was up there? Did it just go up there and turn around, or did it go up there and work up there?

A. It went up there and worked up there.

Q. For a day, a week, a month?

A. He had his "cat" there for probably over a period of two or three months.

Q. This is solely addressing myself to the time the bulldozer, you said, went within fifty feet of the

(Testimony of Chester M. Archbold.)

discovery post. I just rather gathered from your testimony that it went to that point, bladed across the river and came back.

A. Oh, no. He shoved gravel from there. There would be no sense in having it unless he could push and load gravel.

Q. Well, you said he did that to divert the stream. That [111] was the confusion. If you are now saying that he had a bulldozer up there within fifty feet of the discovery post working in the stream bed regularly day by day in 1949, that is all right. I got the impression from your testimony that he sent a bulldozer up there to partially dam the stream and divert it and then he went back down and worked where he had the work.

A. No. He had it there in diverting the stream; he also loaded gravel into the trucks.

Q. Well, he loaded gravel into the trucks at the ramp? A. Yes.

Q. And that is not within fifty feet of the discovery post?

A. No; but he shoved the gravel down. They push as high as five, six, seven hundred feet bulldozing.

Q. I just want to get it clear as to what the use was within fifty feet of that discovery post. You say now that the bulldozer went up there through this entire operation?

A. Whenever it was necessary. He had a road to build and he would move his equipment on.

Q. He had a lot of other equipment a lot closer

(Testimony of Chester M. Archbold.)

to the Tongass Highway than fifty feet from our discovery post, did he not? I mean—I just want to know—I am trying to determine the area of use and the character of the use in the particular area. I don't want to press the point unnecessarily. I just want it stated; that is all. [112]

A. Well, he started in. He had a clamshell and dragline.

Q. To simplify it I would like to restrict it solely to the area fifty feet from the discovery post; that might make it simpler.

A. Well, then, Mr. Berg moved the dragline in within one hundred feet of that, if you want to know.

Q. I just want to find out the kind, the character and the time of use within fifty feet of the discovery post, just solely that point now.

A. A bulldozer——

Q. Well——

Mr. Davidson: I won't ask any further questions about that. That is all.

Mr. Baskin: You may be excused.

(Witness excused.)

CHRISTIAN F. WYLLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name?

A. Christian F. Wyller.

(Testimony of Christian F. Wyller.)

Q. And what is your position, Mr. Wyller?

A. I am District Engineer of the Bureau of Public Roads.

Q. Of what region? Where is that; in [113] Alaska?

A. My district is under Division 10, Alaska, Bureau of Public Roads.

Q. And how long have you held that position?

A. Since 1948.

Q. Are you asquainted, Mr. Wyller, with the gravel pit at Whipple Creek near Ketchikan, Alaska? A. Yes, I am.

Q. Are you acquainted with the fact that gravel has been removed from that creek for the purpose of building roads in Southeast Alaska?

A. I am.

Q. When did the Bureau of Public Roads first use that gravel pit for construction of roads?

A. In general construction of the highway in 1934.

Q. And just tell the Court briefly what was done there in connection with that highway.

A. The gravel was taken from the creek to construct the approaches to the Whipple Creek Bridge.

Q. Where was that gravel removed from?

A. From the creek bed.

Q. And are you familiar with the location of the defendant's claim as it overlaps the thirty-seven acres of land that has been set aside for the Bureau of Public Roads use? A. Yes, I am.

(Testimony of Christian F. Wyller.)

Q. Was any of that gravel removed from any part of his claim? [114]

A. I wouldn't be able to say. I wasn't there at the time it was removed. It may have been removed from just inside the claim limits.

Mr. Stump: I will move to strike that answer as not responsive.

Mr. Baskin: Well, that is for my motion, not for the defendant's.

The Court: That objection is available only to the person conducting the examination.

Q. (By Mr. Baskin): Now, Mr. Wyller, is the Bureau of Public Roads presently engaged in constructing a highway, on the North Tongass Highway? A. I didn't get the first of that.

Q. Is the Bureau of Public Roads presently constructing or supervising the construction of the North Tongass Highway?

A. Yes. We have a large project under construction now.

Q. When did that project begin; that is, when did you begin planning that project?

A. We made a survey for it in 1949.

Q. And then have you, since 1949 then, designed and planned that road?

A. The development of the project was consecutive. The survey began in '49, and shortly after that in the winter of '49 and '50 the design of the project was made and——

Q. Now, then, in connection tell the Court—

(Testimony of Christian F. Wyller.)

strike that. [115] Tell the Court how many miles of road that is now being built.

A. The project is about six and a half miles, I believe.

Q. And does that include both the construction of the road and surfacing and paving the road?

A. It includes construction of the road and surfacing with crushed gravel and crushed gravel material for the future pavement.

Q. Now, tell the Court whether or not the plans for the construction of that road include the removal of sand and gravel from the Whipple Creek gravel pit.

Mr. Stump: I will object to that, may it please the Court.

The Court: It is a plan that hasn't been yet put into execution?

Mr. Baskin: Yes, it is in execution or would have been except for the fact that the defendant barricaded the road and prevented the Bureau of Public Roads from using it.

The Court: Your contention is that it is admissible on the injunction aspect of the case?

Mr. Baskin: Yes; that as well as—my point is, is that and to show, may it please the Court, that as far back as 1950 it was planned for this project to include removal of gravel from the present gravel pit.

Mr. Stump: May it please the Court, on that point the whole thing would be immaterial unless they had a contract [116] that stated it had to be removed from the area.

(Testimony of Christian F. Wyller.)

The Court: Well, I think the plan would be admissible not only on the injunction aspect of the case but also on the issue of good faith, so the objection is overruled.

Q. (By Mr. Baskin): Tell the Court whether or not in planning that road the Bureau of Public Roads planned that the gravel be removed from the Whipple Creek gravel pit.

A. It was planned that the gravel for this project was to be obtained in the gravel pit at Whipple Creek; that was all along from the inception of the project.

Q. Now, did you do anything particular about making that gravel pit available for use in the construction of that road?

A. We had a survey made of the pit.

Q. When did you do that?

A. In May, 1950.

Q. Was that about May 5th to the 16th, something like that? A. That is right.

Q. And now, tell the Court just what that survey consisted of and what was done about it.

A. The survey was to investigate the amount of gravel we could expect to find in the pit, and for that purpose there were a number of test pits dug and a survey was made of the relative location of these test pits to the creek, to the area that had been worked before, and to the highway. [117]

Q. Now, did you estimate the approximate amount of gravel that is on that thirty-seven acres?

A. Yes. We have estimated it on a very ap-

(Testimony of Christian F. Wyller.)

proximate basis because we cannot, without opening the whole pit, tell exactly what is in there, but we have an estimate of what we believe is in the thirty-seven and a half acres.

Q. About how much is that?

A. This is my own personal estimate.

Mr. Stump: May it please the Court, I object.

Q. (By Mr. Baskin): Is it based upon your——

The Court: What is your objection?

Mr. Stump: I object since he says—there is no proof that he surveyed this and did this, and he started to answer that he is not sure. I would like to know the basis of any estimate he is going to give here.

The Court: Well, as I take it, the witness answered the basis of his estimate is observation. I don't know. You may go into that. He may state any estimate that he based on observation, but of course he can't just state a mere guess without ever even seeing the place.

Mr. Baskin: Well, may it please the Court, I can prove it by another witness. I was actually intending to eliminate another witness, but, if they want to go into that, I will be glad to do it.

The Court: I haven't shut you off from the examination [118] except so far as it would elicit a pure guess; that is all.

Q. (By Mr. Baskin): Well, have you examined the test pits and have you been over the area there that is set aside for the use of the Government?

A. Yes, I have, and the survey and the testing

(Testimony of Christian F. Wyller.)

was done not by me but under my direct orders and instructions, and I examined it after it had been done, and the estimate I have is based on the results of the survey.

Q. How much gravel do you estimate is within that thirty-seven acres for the use of the Bureau of Public Roads?

A. My estimate is about three hundred thousand cubic yards.

Q. Now, has the Bureau of Public Roads let a contract for the construction of that highway?

A. Yes.

Q. When did you do that?

A. The bids was advertised on July 20th, and the bids were opened on August 9th, and the contract was awarded on August 14th, and the final signature and execution of contract was August 28th of 1951.

Q. Tell the Court whether or not that contract provides that the contractor may obtain gravel from the gravel pit at Whipple Creek.

A. The contract provides that a portion of the material, about half of all the gravel that is to be obtained, shall [119] be obtained from the gravel pit area, from the Whipple Creek area, and the other part he may obtain it free of royalty from Whipple Creek.

Q. And that part of the contract that provided he shall obtain the gravel there, is that free of royalty? A. Yes.

Q. And it is free of royalty in both instances?

(Testimony of Christian F. Wyller.)

A. That is right.

Q. Incidentally, who is the contractor in that case? A. Manson-Osberg Company.

Q. Now, does the Bureau of Public Roads have any other plans for the use of that gravel pit?

A. Yes. We are to construct three miles of forest development roads for the Forest Service, which the money has been appropriated, and we estimate it will take fifteen thousand cubic yards of gravel from Whipple Creek to build those three miles, and then we have a survey of the road from Whipple Creek out to the end of the present system for reconstruction. While we don't have the money right at the present time, when reconstruction commences there—it will be within a reasonable number of years—the gravel must be obtained from Whipple Creek as the only source.

Q. And how much gravel is the contractor expected to remove from the gravel pit in construction of the present highway? [120]

A. One hundred and fifteen thousand yards, I believe.

Q. How much gravel do you expect to use on this project, this contemplated road-building program that money has already been appropriated for?

A. You mean the three miles for the Forest Service?

Q. Yes.

A. About fifteen thousand yards.

Q. And about how much will be——

Mr. Stump: Just a moment please. I did not

(Testimony of Christian F. Wyller.)

understand that last question, what the reference was to, where you were using fifteen thousand yards.

A. That is for three miles of forest development roads that we have to build for the Forest Service and for which we have the money now.

Q. (By Mr. Baskin): And then on the other I believe you said four miles that you have got surveyed? A. Close to five miles.

Q. About how much gravel will you need for that purpose?

A. We estimate about seventy-five thousand cubic yards.

Q. And will that gravel be removed from the claim that the defendant has staked off on that gravel pit?

A. Yes, it will be, the claim as it overlaps, the thirty-seven and a half acres. We take right out of that thirty-seven and a half and take the whole works, and there isn't [121] going to be that much in other parts.

Q. Mr. Wyller, is there any—strike that please.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Did I understand, Mr. Wyller, it is mandatory under your present contract that some of the material going in on your Manson-Osberg project bid be taken—would you show me that?

A. "Shall be obtained" from Whipple Creek is the only place.

(Testimony of Christian F. Wyller.)

Q. Are the plans in here? A. No.

Q. Mr. Wyller, with regard to the survey, you made a survey of that area in 1949?

A. I had it made. I directed it made.

Q. And how many other surveys have you got of road projects that you are going to do in the future that were made in 1949? Did you do any other surveys in 1949 for future road projects?

A. No, I don't believe I did.

Q. Did you do any in 1950 for future road projects? A. No——

Mr. Baskin: May it please the Court——

A. ——I don't just remember. [122]

Mr. Baskin: ——I examined him as to whether or not they have it; they have those plans. Now, I don't see that it makes any difference when they did it, whether it was '49, '50 or yesterday or any time, so long as it is before this claim was filed.

Mr. Stump: The point I am making, your Honor, is I think Mr. Wyller will admit that they have got surveys they made twenty years ago, that the making of a survey does not necessarily follow that they plan to immediately construct a road.

The Court: You may ask him that.

Q. (By Mr. Stump): You have a survey, too, have you not, from the end of Wards Lake over to White River?

A. No. It was started but it never got beyond the second lake.

Q. Well, you quite often make surveys for future road projects, which naturally you have to do in

(Testimony of Christian F. Wyller.)

advance, sometimes many years; isn't that correct?

A. That is right.

Q. In other words, the making of a survey itself does not necessarily mean you are going to build that road right away, does it?

A. No. But I didn't say we were going to build it right away, either.

Q. No; I know you didn't, Mr. Wyller; but I didn't want the [123] Court to have that impression. Now, you did the survey in '49 on it; when did you request money for that project?

A. Which project do you have in mind?

Q. The Manson-Osberg.

A. That part in the Bureau of Public Roads is not mine.

Q. It is not your department?

A. No. I don't ask for the money. I can tell you the money, the program and request for money, was started in '48-'49.

Q. In advance of the survey?

A. It was the seven-million-dollar special fund that survey was intended for.

Q. Well, that started in '48. You didn't know that you would necessarilly use it for this particular job, did you?

A. Yes, we did. It was on that program for which that money was obtained.

Q. All right. Now, during the time, 1950 and 1951, you publicized the fact, that you were going to build this road, as a matter of common knowledge? A. Yes.

(Testimony of Christian F. Wyller.)

Q. And when did you secure the money for it? When did you make a complete statement that you were going ahead, your department, that you were going ahead to build the road?

Mr. Baskin: May it please the Court, I have the statute here, the public law, that authorized the money, if he wants it, that is a public record, to show the date that [124] it was appropriated, and that was June 2, 1951.

Mr. Stump: June 2, 1951. That was a general appropriation, your Honor, and, while in committee they did list these projects, the appropriation was not made mandatory to any specific project.

The Court: What is your question now?

Mr. Stump: Well, I will withdraw it and make this.

Q. (By Mr. Stump): When did the—I will withdraw that. The policy of the Bureau of Public Roads, the first time the public knows definitely that you are going ahead definitely with a road is when you make an invitation for bids, isn't it?

A. No, not necessarily. On this particular project you are talking about we had some hundred pieces of right of way to obtain, some of them at quite a bit of expense, and at the same moment you begin getting the right of way you are advertising that you are going to make that project for all practical purposes because everyone keeps their prices up then.

Q. You would have to do that the same as a survey? That is a preliminary step, isn't it?

(Testimony of Christian F. Wyller.)

A. Yes; but it is only done when we know we are going ahead with the project.

Q. Well, you mean to say, when you have to buy right of way on the thing, that then you have to put it out on bid; [125] that isn't what you mean, is it?

A. I mean we don't go ahead and get that right of way before we know that we are going to get the money to do it. It is a certainty then that we are going to build it.

Q. But that certainty is not complete until you make the invitations for bids; that is correct, isn't it?

A. The certainty, it is absolutely certain the day the money is appropriated and set aside for it.

Q. What about those cases where you can't get a contractor to bid them in within the appropriation? Haven't you had to reject bids for construction because you didn't have enough money that any contractor would build it?

A. That is right; but we advertise them and we always build them sooner or later for the same money.

Q. For the same money? You have had to get increased appropriation to complete a project because no contractor would bid it?

A. We even had to wait a year to get some more money for it.

Q. That is right. Then the appropriation itself isn't a fact that the road is going to be built, is it?

A. Well, practically so.

Q. Well, as a matter of fact, there is nothing

(Testimony of Christian F. Wyller.)

definite on it until the contract itself is executed; isn't that correct? A. Well, I don't know. [126]

Q. Up until that time, even to the time they respond to bids, you can reject all bids under your invitation, can't you?

A. I can't; but I suppose my superiors could.

Q. Well, you know that your invitations read that way? What I am getting at on this is that until, as a normal practice, the bids are let, the public has no assurance of when any project you are planning is coming into effect, has it?

A. No. I expect you could put it that way.

Q. And then after the bids are let there is no assurance unless contractors can come within the funds appropriated; isn't that correct?

A. That is correct in a certain leeway in that the funds appropriated is in a lump fund for certain projects in this case and can be varied for their own specific project. In other words, probably the original was set up for a million and a half and it came to two million dollars on the estimate and it was distributed to take care of the increase.

Q. Could it likewise follow with a lump sum appropriation for three projects, let's say, of, let's say, seven million dollars, and, if your estimate was that it would do one, two and three, and it would only do one and two, then you could do one and two under the appropriation and leave three until a future date? [127] A. That is right.

Q. Now, at the time you had many requests and

(Testimony of Christian F. Wyller.)

queries as to when the road was going to be built in the Ketchikan area; is that correct?

A. Yes.

Q. And did your office ever issue any statement to the press? A. Yes, we did.

Q. To the effect that it would be built for sure?

A. We did.

Q. And when and where was that?

A. That was in the latter part of March in 1951 when we had a public meeting in Ketchikan on the condition of the roads at that time and as to what we were going to do, and right after that meeting there was a statement given to the press as to what we were planning on doing down there.

Q. But you didn't tell them at that time of the meeting or the press, guarantee them, that any road was going to be built definitely, did you?

A. Well, as definite as it could possibly be made.

Q. But you didn't have the appropriation then?

A. But we knew it was coming through.

Q. And you told the people at that time definitely?

A. We told the people at that time that we expected the appropriation to come through at any time. It had been [128] under consideration in Congress for some time then, and both projects in the Ketchikan area would have the first priority on the money we got.

Q. That meeting was out at Mountain Point with the residents out there, was it?

(Testimony of Christian F. Wyller.)

A. No. It was in the Bureau of Public Roads office in the Federal Building in town.

Q. With the Mountain Point residents primarily?

A. Oh, no. The first probably to be convinced that we were going to do anything was the fellow from the north end.

Q. Well, that is probably so. I recollect it. Did you ever state that you were going to use the Whipple Creek area?

Mr. Baskin: Well, may it please the Court, I don't see that that is material here.

Mr. Stump: I will withdraw it. That is right.

Q. (By Mr. Stump): Now, at the time, Mr. Wyller, that your office prepared the contract, the bids and so forth for that project, is that correct, for the Osberg-Manson Company, you prepared the specification, did you not, your office?

A. No. That is done in the division office. I am in the district office. I have the district office in my charge. I am familiar with all the steps in getting a project up to bids and I am consulted on various phases of the design and specifications and so [129] on.

Q. Well, you know that your office knew at the time that the contract was prepared and let that Mr. Schaub had filed a mining location on the Whipple Creek gravel area; isn't that correct?

A. Yes; that is right.

Q. This reference in the contract where you say

(Testimony of Christian F. Wyller.)

part of it was mandatory to be taken from Whipple Creek, what type of material was that?

A. That is gravel for borrow, borrow material, select gravel.

Q. And how much of that was to be taken from there according to the plans?

A. I will have to look at the schedule there.

Mr. Baskin: May it please the Court, I don't see that it is material to show—well, I guess maybe it is. Go ahead.

Q. What I would like is the amount and the type of borrow, the type of material.

Mr. Baskin: Wouldn't it suffice, may it please the Court, if he just stated the amount? The details of that type, is that material to the matter?

Mr. Stump: I think it is material as to why they would make it mandatory.

Mr. Baskin: So long as it is mandatory, that is the only issue there. It doesn't make any difference what kind it is. It is all sand and gravel. [130]

The Court: Well, the quantity and the requirement that it be taken from there would seem to be material.

A. Thirty-six thousand yards of material for borrow case one was mandatory to be obtained from Whipple Creek. The case two borrow, forty thousand yards, he could obtain, if he so choose, from Whipple Creek and also material for crushed gravel, stone bases and so on.

Q. (By Mr. Stump): Well, now, what type of

(Testimony of Christian F. Wyller.)

material is that? Is that screened and crushed aggregate on this case one?

A. No. It is fairly open-graded gravel that would drain, and it can't be too large, but there is no specific provision on it as to the size, and we don't specify a pit for that use unless we have tested it before and know that it is useable for this particular purpose.

Q. Is it the base coarse that goes in on your roadbed when you get to your graveling part?

A. The material comes up to the level where we continue with crushed gravel, from there on up.

Q. A good portion—they use beach gravel for that in many instances, too, don't they?

A. We use the—whatever material is the best material we can get for a reasonable expense on the particular job.

Q. Do you know why they made it mandatory that they take it from that area?

A. That is the only source within a reasonable haul of [131] that project. That material that is mandatory to be taken from Whipple Creek is material to go on the project from Whipple Creek back to the vicinity of Wards Cove.

Q. Well, what difference would it make to the Bureau of Public Roads if they just specify the quality, which is normal, isn't it?

A. No. When a pit has been proven and has been tested and we decide that is material which we have to have or want on that job, we make the bid for the case one borrow on the basis of the haul

(Testimony of Christian F. Wyller.)

from that pit and, if the price that he quotes or he states in his bid is for just excavation and the placing of the material on the grade, but the haul is paid for, and we have to have a specific bid in order to pay for that haul, otherwise we wouldn't know what the haul would be.

Q. Well, you don't mean to say that Whipple Creek would be the only area you could produce quality that you wanted, do you?

A. Yes, absolutely, within any reasonable haul.

Q. I mean, is that the only area where you could get the quality of the material you wanted?

A. That is, for that project; yes.

Q. Well, then, what about the quality on the rest of it? Where are they going to get that?

A. Well, that is why we left it open for him to find; if he [132] can get the stuff from Schaub's commercial plant for the lower end of the job, he was free to buy it.

Q. Well, why didn't you leave the entire thing at the option of the contractor and merely set up the quality?

A. Because that isn't the best way to get a specific price on a specific item. It is only when we don't have the source that we have to go the other way.

Q. You could have said that they may use the pit without royalty, and in the competitive bidding that would have developed itself, wouldn't it?

A. No.

Mr. Baskin: Well, may it please the Court, I

(Testimony of Christian F. Wyller.)

am going to object to any further examination along that line, as to why he specified that. The fact is it is in the contract.

The Court: It is not so much what else could have been done but what was done here.

Mr. Stump: I can't understand, your Honor, when they say on this planning that they go ahead now and designate a specific area when their main concern is merely quality. In other words, suppose they designate that you will only use Mack trucks on the job. It would be the same thing. I want to know why they did that.

The Court: Well, but it would be equally irrelevant. For instance, we are not here to investigate the [133] efficiency of the B.P.R. All these acts to which he testified took place before there would be any motive arise to create a favorable situation. That is why it is immaterial.

Mr. Stump: No; it was done afterwards, after the thing was staked, your Honor. That is when the bids were let and after they knew about it, and that is why I can't understand. They make a mandatory provision when their sole interest is the quality of the material to be provided.

The Court: Well, it may be that the contract was entered into afterwards, but, as I understood from the testimony—I might be mistaken—that all the contract does is to put in writing what had already been done preliminarily. Now, I don't know if that is the case or not. You might question him on that aspect and, if the decision to use this par-

(Testimony of Christian F. Wyller.)

ticular place for gravel was made after the staking, why, of course you may bring that out.

Mr. Stump: Well, I think that is answered in the facts of the bid itself, which he stated that they were invitations to bid, were made on July 20th, and he admits they knew at that time, and still they proceeded with a mandatory provision.

The Court: But that may not have been the initiation of this requirement that the gravel be gotten from there. I don't know whether it was initiated with the invitation of bids or preceded it. As I say, all the contract does is to [134] merge into a written document what may have been the result of much negotiating and study and various decisions. I don't know. If you can show that the decision itself to require the gravel to be taken from this particular spot was made after the staking, you may show that.

Mr. Stump: Well, I think a corollary of that would be this, your Honor.

Mr. Baskin: Well, it seems he could just ask the witness the question, and he could answer that question very frankly.

Mr. Stump: Suppose I cross-examine my witness.

Mr. Baskin: You may do that.

Q. (By Mr. Stump): In preparation of the bids, Mr. Wyller, there are many changes and alterations made prior to the time that you make the invitation and state the bids; is that correct?

A. I didn't get that.

(Testimony of Christian F. Wyller.)

Q. In preparation of your bids, when are they finally ready in their final form, at the time you issue the invitation to bid?

A. They certainly have to be final by that time.

Q. By that time they are final. Do you know when they were final in the present case?

A. I couldn't tell you the exact date; no. I don't know. I don't final the bids. [135]

Q. You don't final them. Let me ask you this: Have you let any other contracts in the First Division where you have designated that gravel has to come from a certain location? A. Yes.

Q. Where?

A. Well, the present contract, Reed and Martin contract, stipulated, for instance, that the gravel for the southern portion of the project has to come from Herring Bay pit. It is mandatory.

Q. It is mandatory in that? A. Yes.

Q. You are sure of that?

A. I am sure of that.

Q. And what other ones, where you have designated that it has to come from a certain spot?

A. Oh, I can't recall any offhand right now, Mr. Stump. I don't remember right now, but it is common practice.

Q. Your main concern on this gravel is the quality of it, isn't it, Mr. Wyller?

Q. Quality and quantity.

Q. Yes. I mean, that is your main concern when you let the contract; he has to have gravel of a certain quality. What would be the effect where you

(Testimony of Christian F. Wyller.)

put a mandatory provision in it and the quality went down below that set up by [136] you?

A. When we tell him that is where he is going to get it from, then we have to take what we can get.

Q. Even though we as a people might get a road with below quality aggregate?

A. No; because it will always in every case be the best available.

Q. Well, there are certain minimum requirements that you must have, isn't there, not just the best available?

A. There is quite a wide range in the quality we can use.

Q. I have never seen the plans that accompanied this bid, Chris. I don't doubt your word. I just want to know if you are positive that those plans provided on this case one to be Whipple Creek?

A. Yes; that is positive that Whipple Creek was the source, to be the source, of material for case one borrow.

Q. Was there a map similar to that, or what sort of a designation was made?

A. It is on this plan and profile sheets of the project.

Q. Well, as well as you recollect, Chris, would it be half of this area?

A. It is not designated by any dimensions or by outside boundaries. The area is just indicated as the source of the material that is referred to here to show the spot.

(Testimony of Christian F. Wyller.)

Q. Well, you mean—how is it designated on the plan? [137]

A. The designation of a borrow pit on the plans is a dotted outline of an area and says, "borrow pit," and the creek, if it has a name on it, the name is on it. Sometimes there isn't a name.

Q. And do you know how much that would cover?

A. The boundary is only an indication. It has no bearing on size or courses or anything. It is just a sign, you might say.

Q. In other words, you could secure that on an area outside Mr. Schaub's claim?

A. No, you couldn't because you couldn't work without the creek.

Q. Well, are you planning on three hundred thousand yards washing into there?

A. No. But the area in there is streaky. There are layers of silt. If you can't work the pit with water, you wouldn't get good material. You have got to have water in the pit to work the gravel because you will run into silty streaks that have got to be washed out.

Q. Well, then, you could pipe water in and work in this area outside, could you, from up above the creek? You could, couldn't you?

A. Oh, it physically could be done. I don't know if it could be done economically.

Q. Well, that may be true. Now, you mentioned, Mr. Wyller, [138] a survey of the pit area. You had reference to test holes, did you not?

(Testimony of Christian F. Wyller.)

A. We surveyed the test holes in relation to the creek.

Q. You never surveyed the boundaries?

A. No.

Q. Those were merely laid out on the original survey from the 91.13 acres; isn't that correct?

A. No. We did not have it in the ninety-one-point-some acres. We did not have that available. It was laid out on the basis of the adjacent U. S. Land Office surveys, our own monumented survey of the highway and the survey of the creek showing the test holes and so on. It was all correlated together, and we approved and calculated the outside boundaries of the area that we thought was necessary.

Q. I see. Your survey—merely what you mean is that you made test holes and located them?

A. With respect to the highway.

Q. Yes, with respect to the highway. And nothing was done on the exterior boundaries of the portion involved?

A. No. That was all based on the adjacent U. S. Land Office surveys, which are established surveys, and surveys, established monuments, and our own monumented, established monumented survey of the highway.

Q. Now, this map was made, which is similar to the one and [139] identical with the one in evidence in this case, was made by your office, was it not? A. That is right.

Q. Who placed the road on there?

(Testimony of Christian F. Wyller.)

A. You mean the road into the pit?

Q. Yes.

A. That was placed by my office on the basis of a survey made by Mr. McCann, a party down there.

Q. Mr. McCann made an actual survey of that road, and that is the result of his survey on that?

A. That is right.

Q. Regular field notes made and location of the road? A. That is right.

Q. Now, was that done before, or the original survey? A. How is that?

Q. The original survey was incorrect?

A. The original survey was made before this map was made at all, of course, and then there was another survey made later at the time when the place was claimed or shortly after, and at that time we found there was an error in the original survey as to the relative location of the holes and the road to the main road, and that was correlated.

Q. And you don't know when that was done?

A. I believe it was done in August or so in 1951. I wouldn't [140] say for sure what the date is.

Q. You are personally familiar with the area too, are you not? A. Oh, yes.

Q. Do you think that is a true picture of how far that road goes up there?

A. I imagine the road at times have gone up there. I haven't studied the road when I have been down there, just to see where it ended.

Mr. Baskin: Well, may it please the Court, that matter isn't material. The plat is just up there for

(Testimony of Christian F. Wyller.)

illustrative purposes. The only point that is material is the outside boundaries, and we have agreed that the original chart was shown as——

Mr. Stump: I will withdraw the question.

Mr. Baskin: Well, we agree to explain that point to the Court, but on this map, the creek and road is just pleaded correctly, and in addition we have pleaded the defendant's claim, and only for illustrative purposes.

Mr. Stump: They are claiming the road is development on the appropriation, your Honor.

Mr. Baskin: That is right.

Mr. Stump: And the map is absolutely incorrect on it because, if the ramp goes to this area and that is as far as the road goes—— [141]

The Court: You may ask him how far the road goes. But, if it is incorrect, it has to be in some material respect.

Mr. Stump: Well, it is incorrect in a material respect if they are claiming the road is appropriation because it is the amount done.

The Court: If you want to show that road doesn't go that far, you may do so.

Q. (By Mr. Stump): The ramp is just about halfway up on Mr. Schaub's claim, isn't it?

A. May I go over?

Q. Sure.

A. The ramp would be about in here (pointing on the plat).

Q. Two-thirds?

(Testimony of Christian F. Wyller.)

A. Yes; here. A wide spot is in here, and I have driven up about as far as here personally.

Q. That is all.

A. (Witness resumed the witness stand.)

Q. Now, you mentioned future planned use of projects in which you are going to, which you are going to use the area. Is that the present one; and then what is the next one?

A. The one that is coming immediately now is the three miles of forest development road.

Q. And where is that, what area in Ketchikan?

A. It is an area adjacent to Whipple Creek that is in that same network of development roads that the Forest Service [142] has already built.

Q. Well, do you build those, or does the Forest Service?

A. The Forest Service has built all of the present ones, but this particular program of three miles coming up now we are to build for the Forest Service.

Q. You are now going to build the spur roads for them as well as the main roads?

A. Yes. Not as a general policy, I don't believe. In this particular program of the three miles that is coming up in Ketchikan we are to do it.

Q. You will do that through the Bureau of Public Roads? A. Yes.

Q. And is there a survey made on that?

A. Yes.

Q. And then estimates?

(Testimony of Christian F. Wyller.)

A. I believe the estimates are made; yes. I don't make them myself, I mean my office.

Q. I see. Estimates both on costs and materials?

A. As far as I know. I can't answer definitely on that because it is not in my office.

Q. And money appropriated for it?

A. Yes.

Q. Money is already available for the three miles? A. Yes.

Q. And whose funds are those, yours or the Forest Service? [143]

A. Forest Service funds. They are part of the seven million——

Q. Oh, this is coming out of the seven million?

A. ——special appropriation, but it is a part that the appropriation bill specifically gives to the Forest Service to develop roads, and we have to build a road for them on that program.

Q. And you state that the estimates with regard to gravel are how much?

A. About fifteen thousand yards.

Q. Fifteen thousand yards. You don't know what stage that is in as to being ready to issue invitations for bids?

A. No; I couldn't tell you that.

Q. And the other project?

A. Future project, you mean?

Q. Yes.

A. That is from the end of the present contract, the Manson-Osberg, out towards the end of the present road. Now, as I say, it is not beyond the

(Testimony of Christian F. Wyller.)

state of having been surveyed and some of the design work has been completed, but it is in abeyance for the present time, and it may be several years before we get at it.

Q. And how many yards on that?

A. About seventy-five thousand.

Q. Seventy-five thousand. You haven't requested appropriation for that? [144] A. No.

Q. Then the only one that you know of that you have use would be fifteen thousand yards for the three-mile area; is that correct; plus, say, thirty thousand, you say, that is mandatory under the present contract?

A. That is thirty-six thousand.

Q. Thirty-six thousand; yes. That is all you definitely know of at the present time, Mr. Wyller?

A. Yes; except that I know that it is the only source from which we can get any material within the economic range, and we are going to have a continuous program down there for years to come.

Q. I thought I would be able to tell the Chamber of Commerce about all this road building, but it is only three miles more.

Mr. Baskin: I move that that remark be stricken from the record.

The Court: Yes; it will be stricken.

Mr. Baskin: Now, Mr. Wyller——

Mr. Stump: I haven't finished.

Mr. Baskin: Oh, excuse me.

Q. (By Mr. Stump): You state when you started planning this road in 1949; and when did

(Testimony of Christian F. Wyller.)

you start planning on using the Whipple Creek gravel? A. Almost immediately. [145]

Q. Almost immediately? A. Yes.

Q. And did you have maps of it at that time, in 1949?

A. Map of the Whipple Creek area, you mean?

Q. Yes. A. No.

Q. And had you made any surveys as to the quantity available?

A. Only inspections of it.

Q. Just visual inspections?

A. Visual inspections; yes.

Q. And it was May in 1951 that you put the test holes in? A. May in '50.

Q. May in '50. I see. Well, when did you make a request for the Forest Service to do something so you could use this area, Mr. Wyller?

A. We had discussed it with the Forest Service for several years, about this gravel pit area, and made the first formal request for it to be set aside for public use October, '50, I believe it was.

Q. At which time you wrote a letter to Mr. Heintzleman requesting it. That was October, '50?

A. Yes.

Q. And was this map prepared and reservation made as a result of that request?

A. The map was a little later. [146]

Q. It was a basis of your request to them?

A. Yes. There was more or less continual conference or discussion.

Q. Oral discussion?

(Testimony of Christian F. Wyller.)

A. Oral discussion. But the first formal request, written request, was in October, 1950.

Q. And you didn't submit a chart or make a request—who made the chart on the thirty-seven and a half? Was that made as a result of your request for the area? That is what I want to determine.

A. No, not as a request. I made this request of the Forest Service, advising that it be set aside under regulations, and I wanted them to go further for an absolute withdrawal from any formal—and request that it be set aside formally for gravel purposes.

Q. Then this map was satisfactory to your request? I am talking about area now, Mr. Wyller.

A. Yes.

Q. And this area was a result of your request, the designation? I want to be definite on that point.

Mr. Baskin: Well, may it please the Court, the only area we are claiming is the thirty-seven acres. It is obvious that satisfied their needs apparently. He is just asking, does this area satisfy their request? The only part in litigation is defendant's claim. [147]

The Court: Yes.

Mr. Stump: I will show the materiality of it.

Q. (By Mr. Stump): At the time you made that request didn't you ask them, with reference to the gravel deposit, if it would be possible to open up and locate above the present pit? Didn't you ask them that?

(Testimony of Christian F. Wyller.)

A. If that is what is in the letter, that is what I did.

Q. They designated this as being above the present pit and that satisfied you?

A. No, not at all. That takes in the present pit and nothing more practically. After I made that request and suggested an area above the present pit, I had more studies made and a close estimate of what we would need and what was in there, and we decided there was no need of going above the present pit.

Q. I asked specifically if this designation wasn't satisfactory with your request in the letter; you said, "Yes," three times.

A. I didn't get it that way.

Q. You want to change your answer and say it wasn't satisfactory with your request?

A. I don't get you. I guess I better keep shut up.

Mr. Stump: I would like to move the admission of this contract in its entirety.

Mr. Baskin: I am going to object. [148]

The Court: All the facts that are material are in evidence with reference to that contract.

Mr. Baskin: We are not trying to vary the terms of the contract. It is not in issue.

Mr. Stump: They have requested the use of the contract, evidently trying to prove a point in the case. The contract should be in. I haven't had a chance to study it.

(Testimony of Christian F. Wyller.)

The Court: What is there in it that hasn't been brought out?

Mr. Stump: I haven't had a chance to study it.

The Court: I am not going to search through it for something that might have a bearing on it.

Q. (By Mr. Stump): I would like to ask one other question, Mr. Wyller. The original contract provided for clearing a certain area by the bidder, is that correct, in this disputed thirty-seven and a half? A. Yes.

Q. Nine acres, I believe.

A. Well, there is an item for clearing and stripping the pit for which we pay him on a bid price per acre and a bid price per cubic yard of stripping.

Q. The contract set it up?

A. Yes; and it can be varied almost indefinitely.

Q. It was varied, wasn't it?

A. Well, it hasn't started yet. You can't tell before you [149] get through.

Mr. Stump: That is all.

Redirect Examination

By Mr. Baskin:

Q. Mr. Wyller, you have already stated eight or nine acres is removal of overburden by removal of contractors? A. Yes.

Q. Pursuant to the contract you mentioned?

A. Yes.

Q. And is part of that land covered by the defendant's claim? A. Oh, yes.

(Testimony of Christian F. Wyller.)

Q. Tell the Court whether or not the decision to use Whipple Creek as a source of gravel in negotiating of the Osberg contract was made before June, 1951.

A. Yes. It was planned from the beginning or inception of the project in 1949 and 1950, when the design was made, that we were going to use Whipple Creek. Prior to the fall of 1951, I discussed with the chief design engineer the means or cautions we would have to take to keep the road between there and Whipple Creek in shape for the hauling from Whipple Creek and because of the difficulty of keeping the road in shape because it was not in the original project. It was decided to use Whipple Creek and not to have broken-up roads for the hauling, and the [150] contract would be extended to take in the road to the gravel pit and specifically for the project.

Q. When was that?

A. Final discussion was during the winter of 1950 and 1951, and final decision in 1951.

Q. But prior to that, in May, 1951, you had a special survey made to estimate the amount of gravel for this project?

A. There was never any question but what Whipple Creek would, the gravel would have to come from there.

Q. And that was before 1951?

A. Oh, long before.

Q. Counsel asked you about the request you made to the Forest Service in October. Didn't you

(Testimony of Christian F. Wyller.)

on or about January 31, 1951, or didn't the Bureau of Public Roads file with the Forest Service the amount which was the exterior boundaries of that thirty-seven acres? A. We did.

Mr. Stump: What was the date?

Mr. Baskin: January 31, 1951. You have admitted that.

Mr. Stump: Yes.

Q. (By Mr. Baskin): Now, the contract provides in case one the gravel be obtained from Whipple Creek, and in case two doesn't it provide that it may be obtained from Whipple Creek? [151]

A. Yes.

Q. Have you been notified by the contractor that they intend to use Whipple Creek for case two?

A. I understand they are going to obtain all gravel from Whipple Creek.

Q. How much gravel?

A. About a hundred and fifteen thousand cubic yards.

Q. Mr. Wyller, you mentioned a while ago that when the appropriation was made for the construction of the present highway and the present contract that the plans were complete as of that time, did you not? A. I didn't get that question.

Q. Withdraw that question. Didn't you say that it was certain as near as could be that the road would be built when the Congress appropriated the money for this present construction project?

A. That is right.

Mr. Baskin: And at this time, may it please

(Testimony of Christian F. Wyller.)

the Court, I will ask the Court to take judicial notice of Public Law 45, 82nd Congress, Chapter 121, First Session.

The Court: Give me that again. Are you going to file it?

Mr. Baskin: Yes, I will file it with the Court, but I would like to use it a moment though. I will ask the Court to take judicial notice that the Act was approved June [152] 2, 1951, and that it provided an appropriation of three million five hundred thousand dollars, the Bureau of Public Roads, Tongass Forest Highways, Alaska.

Q. (By Mr. Baskin): Now, Mr. Wyller, was that appropriation, approved June 2, 1951, by Congress, as I have just mentioned, the appropriation for the present construction project to the North Tongass Highway? A. Yes, it is.

Mr. Baskin: No further examination. You may be excused, Mr. Wyller.

Mr. Stump: Just a moment.

Recross-Examination

By Mr. Stump:

Q. I think I understood you correctly, Mr. Wyller; you said that in March of 1951 final decision was made to use Whipple Creek on that project; is that correct?

A. In March, 1951, the decision was made to extend the project within a few hundred feet of Whipple Creek.

(Testimony of Christian F. Wyller.)

Q. And when was the decision made to use Whipple Creek for this area?

A. Well, it was just considered as something that had to be done all the time. There was no decision made on it. It was just the only source. We didn't think of any other place. [153]

Q. What is the cost of that project, that bid, you said?

A. Oh, possibly two million dollars.

Q. Well, do I understand you to say that you had the two-million-dollar project and you had never made a survey of Whipple Creek to determine the amount of gravel there?

A. We didn't have the project. We investigated the pit before we had the plans ready for it.

Q. Well, you didn't make the survey on Whipple Creek until May of 1951?

A. We made a survey of Whipple Creek in May of 1950.

Q. May of 1950? A. That is right.

Q. And based on that, that is when you determined there was adequate there. Isn't there a large body of gravel right down at the mouth of Whipple Creek too, where it goes down on the beach?

A. Yes.

Q. You know about that?

A. Yes. I also know how difficult it is to get at, how costly.

Q. When is the first time there was ever a public proclamation as far as the public being advised as to where the source of gravel would come for this

(Testimony of Christian F. Wyller.)

road? The first time they knew about it is when somebody picked up the specification when you made the invitation and offer for bids in July; isn't that correct, Mr. Wyller? [154]

A. I don't know. I couldn't say.

Q. Well, that is the first time it ever came out in print under your department, isn't it? It was in the specifications?

A. I wouldn't say when it was in print.

Q. Well, I mean, could I have gone up to you and said, "Where are you going to get the gravel from on this project"? A. Yes.

Q. Would you have told me? A. Sure.

Q. I doubt it.

Mr. Baskin: I ask the Court to have that stricken from the record.

The Court: Yes; it will be stricken.

Redirect Examination

By Mr. Baskin:

Q. Mr. Wyller, this gravel pit, this Whipple Creek gravel pit, actually has been used by the Forest Service and the Bureau of Public Roads for their numerous past projects and for all other projects in the future including the present one; isn't that correct? A. That is right.

Q. Now, he asked you about a body of gravel down on the beach. Do you know whether the defendant, Schaub, and his [155] partner, Mr. Zaruba, have already staked that?

(Testimony of Christian F. Wyller.)

A. I understand they already have staked all other sources of gravel in the whole area, including the one at the mouth of the creek.

Mr. Stump: I didn't hear the question and answer.

The Court: You mean the last question?

Mr. Stump: Yes.

The Court: You will have to ask the reporter to repeat it.

Mr. Stump: I just want to ask one more question.

Recross-Examination

By Mr. Stump:

Q. Prior to the time that you make the invitations to bid and put out the specifications, will you give information to any contractor about anything that is going to be in those specifications?

A. To a certain extent; yes. In fact, we have at times, we have pre—what is called pre-advertising when the plans are not finished, but we advise the contractors that a certain project will be called for bids maybe two, three or four months ahead.

Q. I understand; but prior to the time that your specifications are open to the public, those remain a secret, don't they, of which you will not divulge the information to [156] anyone?

A. No. They are not secret. Why should they be secret?

Q. You are answering the questions. Then prior to the time you issue a call for bids and you have

(Testimony of Christian F. Wyller.)

specifications complete, I could go and get any information you have already put into the specifications; is that correct?

A. Anything that will be published when the bids are open, if we know it at the time when you ask us, it could be published.

The Court: Well, I assume you are both through now with this witness?

Mr. Baskin: I am, your Honor; yes.

Mr. Stump: Yes. No further questions.

The Court: We will have to recess this case, I don't know to when.

Mr. Baskin: Maybe it could be Monday.

The Court: We have a jury reporting Monday. I didn't expect to put the jury aside to hear a non-jury case.

Mr. Baskin: Well, I didn't think, your Honor, that it would take very long. I certainly didn't think it would take long today. I figured it would take yesterday afternoon, but——

Mr. Stump: How many witnesses do you have left?

Mr. Baskin: Oh, I have got about two. It just depends on though what the evidence is. I have got several [157] I could call.

The Court: Well, how many witnesses are there altogether? You say you have several?

Mr. Baskin: I say I have two more that I expect to call. I could call two or three others if there is any question about some of the facts, but I really

only expect to call two, at least at this time, may it please the Court.

The Court: Well, I don't know whether I can set aside any time for further hearing either until some time Monday, until I see what develops Monday morning. Court is adjourned to ten o'clock Monday morning.

(Thereafter, Court having reconvened at 1:30 o'clock p.m., January 28, 1952, and thereafter, with all parties present as heretofore, the trial proceeded as follows):

The Court: You weren't through with your case?

Mr. Baskin: No, we weren't, your Honor.

The Court: Call your next witness.

EUGENE W. McCANN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Eugene W. McCann.

Q. What is your position, Mr. McCann? [158]

A. I am resident engineer for the Bureau of Public Roads at Ketchikan.

Q. And how long have you been in that position? A. Since April 25, 1950.

Q. Now, Mr. McCann, did the Bureau of Public

(Testimony of Eugene W. McCann.)

Roads make a survey of thirty-seven acres of land at Whipple Creek during May 16, 1950?

A. They made a soil survey and a survey to tie the soil survey into the existing geological position.

Q. What was the purpose of that survey?

A. To ascertain the quality and quantity of materials that were located in the immediate vicinity.

Q. Was that within the thirty-seven acres that was set aside for the Bureau of Public Roads by the Forest Service? A. It was.

Q. And tell the Court just what that survey or prospect consisted of and the nature of it and the extent.

A. I had orders from the District Engineer, Mr. Wyller, to test the material for quality and quantity and to make a report to him and to transmit field notes showing the location to be platted on the thirty-seven and a half acres that had been platted in Juneau from other records, so I took a survey party out and personally accompanied them, showed them where I wanted the holes dug, made further investigation to satisfy myself that outside the [159] surroundings immediately adjacent to the places that we were going to dig the holes that there was material there. Then I had a survey party come out and make a stadia survey of the locations of the holes and a stadia location of the roadway leading through the area.

Q. Well, now, did the Bureau of Public Roads through you and the other personnel of the B.P.R. prospect that area to see if there was gravel there?

(Testimony of Eugene W. McCann.)

A. Oh, yes. We dug holes——

Q. Tell the Court now the size of the holes, the number of holes and just what you did in prospecting for gravel.

A. We dug holes that were probably three feet by six or eight feet, large enough to accommodate a man, so that it wouldn't get so narrow at the bottom that he couldn't throw the material out and so that he could come out of the hole, and went down as far as fourteen feet.

Q. And that was twenty-one test pits that you dug that way; is that correct?

A. I believe that is right; yes, sir.

Q. And then did you examine the remaining part of that thirty-seven acres to see if it contained gravel?

A. I did. I made a survey of it. There is some gravel that is surface gravel that you can see on the surface, and the country is of such terrain that it rolls, and oxbow lakes had been washed where the old creek had gone out and [160] exposed gravel surfaces.

Q. And that part of that exposure and part of that survey and prospect cover a part or all of the defendant's claim that overlaps the thirty-seven acres? A. It does.

Q. Are you familiar with the fact that the defendant on or about the 22nd day of August, 1950, erected a barricade across the only entrance to that Whipple Creek gravel pit? A. I am.

Q. Tell the Court whether or not that barricade

(Testimony of Eugene W. McCann.)

interfered with or prevented the Bureau of Public Roads in performing its duties and services.

A. It did. I was given orders by my superiors not to enter on the property because of the barricade and because of the "No Trespass" sign until I was given written notice to proceed.

Q. Mr. McCann, have you at any time either staked or surveyed a part of that land for the purpose of removing gravel in connection with the road-building program of the B.P.R. and its contract with Manson-Osberg? A. I have.

Q. What have you done in that regard?

A. I have staked approximately eight acres for clearing and grubbing and stripping.

Mr. Stump: May I ask when that was? [161]

A. I don't have the exact date with me. I have it in my diary. It was sometime this fall. It was just immediately following the injunction.

Q. (By Mr. Baskin): Would you have done that earlier if you had been able to have gone into the area? A. I would have.

Q. So, were you prevented from doing that by reason of the defendant's barricade?

A. I was.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Now, with regard to the size of those test holes, Mr. McCann, did you personally inspect all of them? A. I did.

(Testimony of Eugene W. McCann.)

Q. You located every one of them?

A. Well, I made marks and left them there and explained to the crew about where I wanted them. They might have varied four or five feet; if they hit a root or something, they would move over.

Q. Did you go out and inspect them yourself?

A. I did.

Q. You say you dug down to a depth of fourteen feet?

A. I think you will find that we went as far as fifteen or [162] fourteen feet. That is not in all pits, but that was what we tried to attain—fourteen feet.

Q. You want to tell the Court that you dug holes down fourteen feet? A. That is right.

Q. And what size were they?

A. Well, about three by eight, maybe four by eight, depending on the compaction of the gravel.

Q. As a matter of fact you practically always used pipe that you drove? A. No, I did not.

Q. In none of them?

A. Some of them we did; yes.

Q. How many of them?

A. After we got down as far as we could dig safely, sometimes we drove a pipe, but that was very rarely.

Q. Well, as a matter of fact, mainly the overburden was taken off and then you reached the gravel and then used pipe?

A. No, that is not true.

(Testimony of Eugene W. McCann.)

Q. And you inspected all those yourself after they were completed?

A. I did. I was there when we gathered the composite sample to send to Anchorage.

Q. Well, at no time to your knowledge, Mr. McCann, did your department ever make any exterior boundary survey on the [163] ground?

A. Not to my knowledge for the exterior boundaries; no, sir. However, there are some of the corners that I am familiar with. The ones along the roadway, I am familiar with the corners in the ground now. I don't know about the back corner.

Q. One other question. Did you make the field notes and place this gravel road on the drawing?

A. I caused them to be made; yes, sir.

Q. Well, you just did this from notes of somebody else?

A. I was present when part of it was run and directed the layout of it; yes, sir.

Q. Do you think this is a true picture of the length of that road? A. May I look at it?

Q. Yes.

A. (Witness approached the blackboard.) It is true, inasmuch as they have drawn these lines in a little too far, but as far as this general location it is true that——

Q. I mean, the length of it.

A. I think it is probably a little shorter than this, but the draftsmen probably drew it right along the line.

Q. I see.

(Testimony of Eugene W. McCann.)

Mr. Stump: That is all.

Mr. Baskin: No further examination. Just a moment. [164]

Redirect Examination

By Mr. Baskin:

Q. Was that survey and prospect made for the purpose of determining the amount of gravel so it could be used on the present road-building program and any future developments in that area?

A. It was.

Mr. Baskin: No further examination.

Recross-Examination

By Mr. Stump:

Q. In May of 1951 you had no determination as to the amount of gravel? A. 1950.

Q. I mean, 1950.

A. Not to my knowledge. There might have been.

Mr. Stump: That is all.

(Witness excused.)

W. A. CHIPPERFIELD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name and occupation and position, Mr. Chipperfield? [165]

(Testimony of W. A. Chipperfield.)

A. My name is W. A. Chipperfield, occupation is forester, and my position is in charge of recreation and lands division of the Forest Service.

Q. Are you familiar with the fact that the Forest Service reserved as a public service site ninety-one acres in the Whipple Creek area near Ketchikan, Alaska, in 1940 about September 11th?

A. I am.

Q. Mr. Chipperfield, has that order or that act on the part of the Forest Service, setting that land aside as a public service site, ever been revoked?

A. It has not.

Q. Then is that still in effect then as a public service site, that is, the whole ninety-one acres?

A. It is.

Q. Are you familiar with the order of the Regional Forester, Frank B. Heintzleman, of February 9, 1951, setting aside thirty-seven and a half acres as a gravel pit or source of material for the Bureau of Public Roads?

A. I am. I helped draft the order.

Q. Did that order revoke any part of that previous order setting aside the ninety-one acres?

A. It did not. It was superimposed over that order. It took precedent, but it did not rescind it.

Q. Now, Mr. Chipperfield, insofar as the Forest Service [166] was setting aside this land for, this thirty-seven acres, for the Bureau of Public Roads on February 9, 1951, was that a final order or a final act setting that property aside for that purpose?

(Testimony of W. A. Chipperfield.)

A. Insofar as the Forest Service was concerned in regard to appropriating that area for our use, it was.

Q. And for the use of the Bureau of Public Roads?

Mr. Stump: Mr. Baskin, I didn't get your reference to what order you referred to in that last question.

Mr. Baskin: The order of February 9, 1951.

Mr. Stump: Of the thirty-seven and a half acres?

Mr. Baskin: Yes.

Mr. Stump: That is all. Thanks.

Q. (By Mr. Baskin): Well, that order made it available for the Bureau of Public Roads as well as the Forest Service, did it not?

A. It did. It was chiefly on their recommendation that it was made.

Q. Now, were there any further acts or actions on the part of the Forest Service for that land to be withdrawn? A. There was one.

Q. What was that?

A. That was following our custom, procedure in regards to protecting by formal withdrawals by the Secretary of the Interior of undeveloped areas that we had classified for [167] specific use. In those cases we requested or we recommended to our chief in Washington that he request the Bureau of Land Management to withdraw those areas from mineral location, but that was done chiefly on areas that were undeveloped and we had no claim of appro-

(Testimony of W. A. Chipperfield.)

priation other than the mere fact of classification. There was no physical improvements or anything on those areas.

Q. Now, then, this thirty-seven acres that the Forest Service requested be withdrawn, was that undeveloped or developed land?

A. It was developed both recreationally and prospected and developed for gravel and road-building material.

Q. And was that further effort to have the land withdrawn for the purpose of avoiding possible litigation in the future?

A. That was the only reason.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Davidson:

Q. Mr. Chipperfield, the ninety-one acres recreational order is still effective?

A. It has never been rescinded.

Q. Now, you mean by that the use of that gravel road, continuous of gravel road, won't interfere with that [168] other area?

A. No; not necessarily.

Q. The use of heavy equipment in that thirty-seven-acre area won't interfere with the rest of the other area?

A. You understand that it is classified——

Q. As a recreation area.

A. And also for gravel purposes.

(Testimony of W. A. Chipperfield.)

Q. The thirty-seven is gravel; the ninety-one is not? A. That is right.

Q. Did you propose to use, or the Bureau of Public Roads, use heavy equipment? What I am trying to get at is in fact that ninety-one acres is no longer useful for that purpose because the use of heavy equipment will interfere with the recreation use of the remainder, will it not?

A. No, I wouldn't say that.

Q. This thirty-seven acres will have to be cleared for use of gravel area, will it not?

A. It will.

Q. Won't that interfere with the use of the remaining portion?

A. Not necessarily. It may change the nature of the use, [169] but it would still have recreational values.

Q. All right. Can you identify this?

Mr. Baskin: I would like to examine the exhibit.

Mr. Davidson: This is one you gave me.

Mr. Baskin: Well, I don't know what it is though. Oh, I see.

Q. (By Mr. Davidson): This is a covering letter from Mr. Heintzleman, I take it, to Washington with a letter that was drafted here to be signed in Washington and sent to the Bureau of Land Management? A. That is correct.

Q. And this date was inserted in Washington and the copy returned to you?

(Testimony of W. A. Chipperfield.)

A. That is right. The date is the date the Chief of the Forest Service signed the letter.

Q. This request was to withdraw it from all forms of location and entry, including the mining laws, and, except as herein provided, from leasing under the mineral leasing act?

A. That is exactly what it says, I think.

Q. Right. And it goes on to say: "The land shall be subject to leasing under the mineral leasing laws for their oil and gas deposits provided no part of the surface of the land shall be used in connection with prospecting, mining and removal of the oil and gas."

A. That is a phase that we were required to put in to meet [170] certain requirements.

Q. Now, did the Secretary of the Interior withdraw the land in accordance with that request?

A. No, sir.

Q. He withdrew it in fact——

A. Pardon me. Did you say the Secretary of the Interior?

Q. Yes.

A. He does, I think. I thought you meant the Secretary of Agriculture.

Q. No. The Secretary of Agriculture never took any action on this? A. No.

Q. The Secretary of Interior, you say, withdrew it in accordance with that request?

A. I think he did after he had made the required investigations in regard to it.

Mr. Baskin: Your Honor please, I submit that

(Testimony of W. A. Chipperfield.)

the order itself speaks for itself as to whether it was withdrawn.

Q. (By Mr. Davidson): Well, then, I will ask you again, isn't it a fact that the Secretary of Interior did not make this exception and left the land subject to the mineral leasing act in toto?

A. How was that?

Mr. Baskin: Well, I object, your Honor. That is immaterial anyway. [171]

The Court: It seems to me that is a matter of law.

Mr. Davidson: Well, I would like to offer this in evidence at this time.

Mr. Baskin: Well, I object, your Honor. It is nothing but what the witness has already testified to, the contents of it. It is not material, just a copy of a letter.

The Court: So long as there is no dispute over what was done and it becomes a question of law, then, of course, I wouldn't think there would be any necessity of putting in the record anything of that kind.

Mr. Davidson: Well, your Honor, it is merely one of the administrative steps which the Government admits and in fact asked us to admit that. They made a demand for admission concerning that request. We would be happy to admit it.

Mr. Baskin: Which you have admitted.

Mr. Davidson: We admitted that something was done, and I would like what was done to be part of the record. It is a little difficult, for instance, to

(Testimony of W. A. Chipperfield.)

read the contents of a letter and get the entire picture of what actually was done here without the letter available.

Mr. Baskin: But, may it please the Court, we asked the defendant to admit that the Forest Service sent to the Bureau of Land Management on or about February 13, 1951, a map and a request that the land described in the map be withdrawn. They have admitted that the Forest Service did [172] that and that the letter was received and the map by the Bureau of Land Management between February 13 and March 8, 1951, so that point has been admitted. There is no question about that, and the letter itself is just a letter of transmittal.

Mr. Davidson: The point about it, I think it very clearly shows that the request, this Correction Memorandum, is, as Mr. Chipperfield said quite right, the most they can do by withdrawing the land, and it also shows that they tried to get it withdrawn from the mineral leasing act, and it also shows that the Secretary of the Interior exercised his independent judgment and refused to do so or failed to do so.

The Court: Well, but what of it? It all depends on what he did do and not what preceded it.

Mr. Davidson: Well, it goes to show, your Honor, that this thirty-seven acres did not withdraw it because, if it did do it, this letter shows what they hope to accomplish by that withdrawal and the fact that the final discretion and final power is in the Secretary of the Interior, and, if

(Testimony of W. A. Chipperfield.)

that power was exercised, I think it goes to show that the Secretary of Agriculture and Forest Service don't have that power.

The Court: But their power is not in controversy here. Now, all I am trying to do is to keep the record as brief as possible and to avoid duplication.

Mr. Davidson: There is no duplication about this.

The Court: Now, you have everything in the evidence, [173] as I see it, that would be shown by this, and the fact that the Forest Service, as you intimate, attempted something in which they failed is just simply cluttering up the record and something the Court wouldn't concern itself with anyhow. It is what was finally done by the person having the authority, the Secretary of the Interior, not what somebody attempted to do about it.

Mr. Davidson: Very well. I take it that it is not admitted.

The Court: No. So long as the facts are in the record, why, that is sufficient without duplicating it.

Mr. Davidson: One more thing.

Q. (By Mr. Davidson): This letter to the Bureau of Land Management states it is recommended that you withdraw this area subject to existing valid claims, does it not?

A. It does; I think it does. It should anyway.

Q. Check it.

A. He couldn't do it otherwise.

(Testimony of W. A. Chipperfield.)

Mr. Davidson: Your Honor, I would once again like to have these regulations and policy of the Forest Service offered in evidence and with one further argument, that once this case is over these will no longer be available to me.

The Court: Why don't you have a copy of them made now so you can stick them in your pocket?

Mr. Davidson: All right, if I can make a copy of [174] them now, that is fine. All right.

Mr. Baskin: Well, if you will copy all that is in there, we have no objection. Are you through with the witness?

Mr. Davidson: That is all.

Mr. Baskin: You may be excused.

(Witness excused.)

EINOR H. HYBERG

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Einor H. Hyberg.

Q. What is your position, Mr. Hyberg?

A. At present maintenance foreman for B.P.R. at Ketchikan.

Q. How long have you been maintenance foreman?

A. Oh, acting since October until this past week or two.

(Testimony of Einor H. Hyberg.)

Q. And how long have you been employed by the Bureau of Public Roads in the Ketchikan area?

A. Since 1932.

Q. Are you familiar with the gravel pit known as Whipple Creek gravel pit north of Ketchikan?

A. I am.

Q. Mr. Hyberg, has the Bureau of Public Roads used that pit for the purpose of obtaining gravel in repair and maintenance [175] of the highways?

A. They have.

Q. How long have they been using that pit?

A. As near as I can remember, as soon as the bridge was completed, that we had access to it, why, we have been using it.

The Court: What we want here is the year or the month, or at least the year. Nobody knows necessarily when the bridge was completed.

A. As I remember, it was 1934 when the bridge was completed and so, therefore, it would be from there on.

Q. Up until the——

A. The present time.

Q. The present time. And are you familiar with the claim that the defendant has on that gravel pit, the approximate location of it?

A. Approximately. But I haven't gone over any of the boundary lines or such. I haven't had no occasion to do that.

Q. But you know—you have examined the chart that is on the board there, have you not?

A. I have.

(Testimony of Einor H. Hyberg.)

Q. And noticed the location? A. I have.

Q. Have you since about 1934 removed gravel and sand from within his boundary for the purpose of repair and maintenance [176] of the road?

A. We have.

Q. Could you tell the Court about how often you used that area as a source of gravel material?

A. Well, our heaviest use was in the springtime, at breakup and through the summer, and whenever any contracting was done, why, we tried to get in trucks there to haul along with them. It was very convenient for us and through permission of the Forest Service.

Q. Now, are you acquainted with the fact that the defendant barricaded the only road into Whipple Creek about August 22, 1951?

A. I am aware of that.

Q. And did that effectively prevent the Bureau of Public Roads from obtaining gravel for repair of the highway? A. At that time it did.

Q. Did it require the Bureau of Public Roads to haul gravel a long distance for repair of the road? A. It did.

Q. Where did you have to obtain gravel after that barricade was erected?

A. Well, South Tongass Highway, at the end of the road, Herring Cove Pit.

Q. Then you had to haul gravel from the south of Ketchikan, through the city and up to repair the northern part of [177] the highway?

A. That is right.

(Testimony of Einor H. Hyberg.)

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Where was the first area from which you made use in 1934? That was on the lower side, wasn't it? A. No. It was on the upper side.

Q. At the time of the completion of the road, how many yards of stock piles was left alongside of the North Tongass Highway?

A. In stock piles along the road? Well, I wouldn't know for sure. We used this for maintenance of the road and where it was washed out and, whether there was stock piles or crushed gravel, that is what we covered with.

Q. You couldn't use from this pit for surfacing holes?

A. We have. Since the stock piles of crushed rock were depleted and through the spring breakup, why, that was all we had practically.

Q. There is no other beach that you can go to in that area and get some gravel, no other pit?

A. Not to my knowledge. There is small beaches at various places, but practically depleted now.

Q. What about the pit at Wards Cove? That was available all [178] last fall, wasn't it?

A. That I wouldn't know. It wasn't a place for use with our equipment to get in there.

Q. Well, the contractors had had big equipment in there removing gravel at Wards Cove, hadn't they?

(Testimony of Einor H. Hyberg.)

A. At that time we probably didn't need it.

Q. Then you didn't need any last fall to speak of?

A. Well, we never worked in there last fall. We needed it, but it wasn't available there, and we had other work to do at that time.

Q. You are talking about after the barricade was put up?

A. Well, yes, and previous to that too there was a while that we didn't use it.

Q. Then, there was no particular necessity for the material during that period of the year then?

A. No. It isn't all the time. Of course there is times when the road is frozen you don't need it particularly; spring breakup or through the summers and heavy rains it is urgent to have this so-called gravel and so on for maintenance.

Q. There is an available pit at Wards Cove now, isn't there? A. Yes.

Q. Which is approximately four and a half miles from Whipple Creek?

A. Yes, there is. [179]

Mr. Stump: That is all.

Mr. Baskin: No further examination.

(Witness excused.)

HUGH A. STODDART

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Hugh A. Stoddart.

Q. And what is your position, Mr. Stoddart?

A. Division Engineer.

Q. Who do you work for?

A. The Bureau of Public Roads.

Q. Mr. Stoddart, are you familiar with the Act of Congress known as the Federal Aid Road Act, no, Federal Aid Highway Act, 1950, approved September 7, 1950? A. Yes.

Q. Did that act authorize——

Mr. Davidson: The law speaks for itself.

Mr. Baskin: Very well. May it please the Court, I ask the Court to take judicial notice of Public Law 769, 81st Congress, approved September 7, 1950.

The Court: Can't you give a United States Code citation of that or Statutes at Large? [180]

Mr. Baskin: Chapter 912. It doesn't have the citation there.

The Court: Well, that wouldn't of course. But what I am getting at is that has been issued or published nearly eighteen months ago, and it should be in the Statutes at Large by now.

Mr. Baskin: Well, it should be, may it please the

(Testimony of Hugh A. Stoddart.)

Court. I just didn't have a chance to examine it to see.

Mr. Davidson: I believe it is 23 U. S. Code.

The Court: Well, what is the title of the act?

Mr. Baskin: The title of the act is the Federal Aid Highway Act of 1950.

The Court: Well, then it must be amendatory of existing legislation.

Mr. Baskin: Well, that is true; it is.

The Court: Well, then it certainly should be in the U. S. Code without any doubt whatever.

Mr. Baskin: Well, I don't doubt that. I just don't have the citation here, the U. S. Code citation for it. Section 3 of that Act provides as follows: "For the purpose of carrying out the provisions of Section 23 of Federal Highway Act, 42 Stat. 218, as amended and supplemented, there is hereby authorized to be appropriated," then among other things, "3. For forest highways within, adjoining or adjacent to the Tongass National Forest, the additional sum of three million [181] five hundred thousand dollars for the fiscal year ending June 30, 1951, and a like sum for the fiscal year ending June 30, 1952, to provide for the improvement and extension of the highway facilitates to serve the present and potential traffic incident to the further development of timber and other resources of Southeast Alaska."

Q. (By Mr. Baskin): Now, Mr. Stoddart——

The Court: Is that the only part of the Act that you wish the Court to take judicial notice of?

(Testimony of Hugh A. Stoddart.)

Mr. Baskin: Yes, may it please the Court, it is.

Q. (By Mr. Baskin): Mr. Stoddart, you heard me read this Act of Congress and was that, did that Act authorize the expenditure of money and for the construction of the present road-building program of the North Tongass Highway which is being constructed by Manson-Osberg Company?

Mr. Stump: May it please the Court, I think I should object to that. As I understand the question, it is: "Does that Act authorize the present Manson-Osberg contract?" Well, all you have to do is read it to tell whether or not it authorizes that.

The Court: Well, I don't think any act would ever authorize any specific contract. The question would be, it seems to me, whether a specific contract was let under the authority of some act.

Mr. Baskin: May it please the Court, I will withdraw [182] the other question.

Q. (By Mr. Baskin): Mr. Stoddart, was the present contract with Manson-Osberg Company for the construction of the highway, the North Tongass Highway, let pursuant to the provision of this, the authority contained in the Act I just read?

A. I might say it is pursuant to the appropriation made following that authorization.

Q. Very well.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Mr. Stoddart, there was nothing in that Act that made it mandatory on your department to

(Testimony of Hugh A. Stoddart.)

build any specific road as long as it was within the authorization of the Act and a Forest Service road; isn't that correct? A. That is right.

Q. And, however, as a result of this, you did complete specifications on this present contract which you let? A. Yes, sir.

Q. And when were the specifications received; do you know?

A. I couldn't say exactly; sometime in the spring of 1951.

Q. And you had the money when?

A. June 2, 1951. [183]

Q. And when did you call for the bids?

A. I couldn't answer without reference to the record.

Q. Well, was it in July; do you remember that?

A. Yes, it was.

Q. The latter part of July?

A. I believe so. I think Mr. Wyller has given the dates on that already.

Q. Yes. And do you know the reason why, if you had the money and the specifications——

Mr. Baskin: Well, I will object to that, may it please the Court.

Mr. Stump: He can't object until I ask the question, your Honor.

The Court: Well, you may finish the question.

Q. (By Mr. Stump): You had the money by June 2, you say, of 1951? A. Yes.

Q. And the specifications already prepared.

(Testimony of Hugh A. Stoddart.)

Why did you wait so long to advertise that after you had it available?

Mr. Baskin: Well, I object. It is immaterial.

The Court: It is immaterial. Objection sustained.

Q. (By Mr. Stump): And the dates that Mr. Wyller gave with regard to the letting of the contract, invitations for bids, are correct?

A. Well, I think he referred to the record. I am sure they [184] must have been.

Redirect Examination

By Mr. Baskin:

Q. Mr. Stoddart, were the specifications for the building of that highway completed prior to June 21, 1951? A. I couldn't answer that.

Q. Well, I believe you said they were completed during the spring of 1951?

A. I think they were but I couldn't answer that question without referring to the record.

Q. Very well.

Mr. Baskin: No further examination.

(Witness excused.)

Mr. Baskin: May it please the Court, I am going to ask the Court to take judicial notice of all of the annual appropriation acts of Congress since 1934 for the United States Forest Service and the Bureau of Public Roads. I have had all of those statutes compiled once. I don't seem to find it. I will prepare it and insert it in the brief.

The Court: Well, is there some particular parts

of these appropriation acts that you wish the Court to take judicial notice of?

Mr. Baskin: For the appropriation for the construction, maintenance and repair of the highways in the Tongass [185] National Forest. The Government rests, may it please the Court.

Mr. Stump: At this time the defendant would like to move to strike from the complaint the request for damages because there has been a total lack of proof of any damages plaintiff has shown in the case, your Honor.

The Court: Have you anything to say about that?

Mr. Baskin: Well, may it please the Court, we do allege that we have been damaged and, while this is a continuing trespass, we have shown the Government has been denied the right to use the property by the witness Hyberg and all of the others during the time that the defendant had the barricade there and, while we haven't shown in dollars and cents, we have shown that we have been damaged sufficiently to warrant this Court to enter a permanent injunction.

The Court: That isn't of course what I am interested in. I thought from the motion that there was a prayer for damages in a specific amount. Is there anything like that?

Mr. Baskin: No, may it please the Court, there isn't. We asked for damages but we——

The Court: Then of course the motion is denied.

Mr. Davidson: At this time we would like to make a motion, your Honor, to dismiss this action

on each ground of appropriation as alleged and proven by counsel. It doesn't constitute an appropriation of this land barring mineral entry [186] under the law. I am prepared to argue each separate ground in the complaint, the ninety-one-acre appropriation, the thirty-seven-and-a-half-acre appropriation, and the use, which, as far as I can see, are the only claims the Government put forth here.

The Court: I will reserve ruling on that.

Defendant's Case

H. F. SCHAUB

called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stump:

Q. Will you state your name?

A. Herbert F. Schaub.

Q. And where do you live?

A. Ketchikan, Alaska.

Q. And what is your business?

A. Sand and gravel and prefabricated concrete products.

Q. Were you in the sand and gravel business prior to the time of your present business?

A. I was.

Q. When was that?

A. In 1940, at Boca de Quadra, furnishing sand

(Testimony of H. F. Schaub.)

and gravel to the United States Engineers at Annette Island.

Q. You had a mineral claim? [187]

A. A mineral claim, placer claim.

Q. And when did you take over your present operation, Mr. Schaub?

A. Approximately April, 1950.

Q. And that is in Ketchikan?

A. That is in Ketchikan.

Q. And do you operate that as owner, or how?

A. I operate that as a leaser.

Q. Do you lease it from somebody?

A. I lease it.

Q. And from whom?

A. I lease it from Alaska Concrete Products Corporation. I am a subleaser.

Q. And where is your source of supply for material there?

A. In the tidelands and in the channel of Tongass Narrows.

Q. Do you also operate a cement block plant for making building blocks?

A. Yes. We have a complete building block machine and equipment and also a batch plant for producing ready-mix concrete.

Q. Is there any other similar business operating in Ketchikan? A. No.

Q. Now, Mr. Schaub, at the time you went into business in 1940 did you prospect at Ketchikan and adjacent area for sand and gravel?

A. I did.

(Testimony of H. F. Schaub.)

Q. Did you go out to Whipple Creek at that time? [188]

A. Yes. We looked Whipple Creek over where the bridge is and where this deposit in question is and also at the mouth of Whipple Creek and also looked all up the channel, clean up to Burrows Bay. That was the time the United States Engineers was vitally interested in material for the runways.

Q. At Annette Island?

A. At Annette Island.

Q. Now, Mr. Schaub, at the present time have you estimated the source of supply available in your present operating site? A. I have.

Q. What is that approximately?

Mr. Baskin: Your Honor, I don't see—go ahead. I will withdraw it.

A. My personal estimate is possibly sixty thousand yards left to be removed, and that is corroborated by the City Engineer's estimate.

Q. (By Mr. Stump): Did you have him survey it and estimate it?

A. He has surveyed the land; yes.

Q. What is the status of that land at the present time as to ownership?

A. Well, I have a lease, and in this lease of mine there is a clause there granting the Spruce Mills the right to go in there at any time and construct a dock on the tidelands, [189] and the minute they walk in there, why, I am out of business.

(Testimony of H. F. Schaub.)

Q. Who presently is claiming ownership to that sand and gravel?

A. I believe it is the Bureau of Land Management.

Q. Have you requested that it be put up for sale by bid? A. I have.

Q. And that is pending at the present time?

A. It is now pending, and I cannot remove any material there now.

Q. Have they told you you are a trespasser?

A. A trespasser.

Q. Now, Mr. Schaub, is there any other known source of supply for you to continue in business with that can be economically operated that you know of other than Whipple Creek?

A. That is the only source that is in a reasonable length or distance to town that you can economically produce sand and gravel aggregates for Ketchikan.

Q. Now, with regard to the type of material in Whipple Creek, have you had any test made on it?

A. I have.

Q. Test for what?

A. Tests mainly for aggregates for the production of concrete. We have had that tested by the Northwest Testing Laboratories in Seattle.

Q. And what was the result of the test? [190]

A. They have approved the material. It passes standard specifications.

Q. And with regard to your present material in

(Testimony of H. F. Schaub.)

making building blocks, how does Whipple Creek compare with that?

A. It will be able to produce building blocks very satisfactorily, which at the present I cannot produce any building blocks. They don't meet the public demand. They are poor in quality and poor in color. People don't like them. My block plant now, which I have invested possibly ten thousand dollars in, is practically idle. This material at Whipple Creek is—or at Quadra—where I am at now it is dark-colored, stained and makes an awful poor muddy-looking block, and it does not meet the requirements of the public.

Q. Have you purchased any equipment to go into Whipple Creek? A. I have.

Q. It is available now?

A. I have some of the equipment on the job now at my preesnt plant, and I have tentative arrangements in the States with various machinery houses for equipment for Whipple Creek.

Q. Now, Mr. Schaub, do you know what the needs of Ketchikan are on planned construction for the coming year or year and a half on the road programs, schools, and so forth and so on, with regard to cement and other aggregates used in building material? [191] A. I do.

Mr. Baskin: May it please the Court, I am going to object to that unless it is confined to Government construction. I don't see where the general needs of a community has any relationship as to whether or not the Government has appropriated this land for its own use or not.

(Testimony of H. F. Schaub.)

The Court: Yes; I rather think so, too.

Mr. Stump: Well, all the city work, your Honor, is with public participation.

The Court: But how would it make any difference here, in determining who has the right to this particular tract of land, what the demand is? It seems to me it wouldn't have the slightest tendency to prove any issue in this case.

Mr. Stump: It would, your Honor, go to the question of good faith that they have raised in this case.

The Court: No. The good faith, as I see it, wouldn't depend on the demand. I don't think there would be any controversy over the fact that there is a demand for sand and gravel. The good faith, as I understand it, comes in here because of the imputation or inference perhaps on the part of the Government that it was after it had gone in and made certain explorations that their land was in effect jumped. The matter of demand for the material wouldn't throw any particular light on good faith.

Mr. Stump: Well, it would to this extent, [192] your Honor, if his present supply was very questionable on the thing, his testimony with regard to his need, which would have something to do with the value of economically operating from Whipple Creek. In other words, the minute the one source of supply is dropped out, maybe it would be more costly to operate there, but it would be cheaper than doing it some other way, so, as far as the

(Testimony of H. F. Schaub.)

exploration and discovery of it, he has already stated he knew about it in 1940 and went there and inspected that deposit and another one before going into this one.

The Court: Well, I think it can be assumed here, and I don't think there is any dispute about it or could be any dispute, that there is a demand for sand and gravel, and it may be considerable, but the view I take of it is that it wouldn't tend to prove or disprove the question of good faith.

Mr. Stump: Well, they have raised the inference, your Honor, that because of the proposed road Mr. Schaub went out and staked out this gravel claim. The proposed road isn't the reason, your Honor. He is liable to lose his present pit; he has been told it belongs to the Government; and, if he does, certainly he is justified in looking for another source of supply regardless of the timing on it, your Honor.

The Court: Well, the position, as I see it, that is taken by the Government is not that there is no demand, not that he wasn't put in the position himself where he had to [193] find another source of supply, but that he seeks to take advantage of their exploratory acts and, so to speak, their discoveries, and the exact extent of the demand for gravel would be immaterial on that question.

Mr. Stump: Well, if it is just relegated to the fact of their discovery, if that is the Court's thought on it, why, I would agree with the Court on that.

(Testimony of H. F. Schaub.)

Q. (By Mr. Stump): Well, Mr. Schaub, you stated in 1940 you went into the Whipple Creek area and prospected that for sand and gravel?

A. That is right.

Q. And at that time was it your intention to bid on a contract let by the United States Army Engineers for furnishing aggregate for the surfacing of the Annette Airfield? A. That is right.

Q. And how much of an investigation did you make of the Whipple Creek area?

A. Well, I traced Whipple Creek up from the mouth of the creek until we come to the falls there, and then I detoured on up to the road where the new bridge was put in, as I understand, around 1934, prior to my time. Deposits were very evident along the river channel, the creek channel, with ample supply of sand and gravel clean on up for a distance of approximately twenty-five hundred, three thousand feet from the bridge. [194]

Q. Did you go on up the creek?

A. I walked clean up the creek. I have been clean back in the back end of that many times on hunting expeditions and know the deposit was there, and, seeing these past operations in the year, there was no need for me to do any exploration work. There is pits as deep as twenty-foot, fifteen or twenty-foot deep, where the past contractors, private contractors, had been working. There is ample supply there, without going out and making any test holes, to meet the requirements that are now faced in Ketchikan.

(Testimony of H. F. Schaub.)

Q. Did you discuss with the three contractors, that worked in the area prior to the time you located it, the question of the amount of supply available there?

Mr. Baskin: Well, I object. That would be hearsay.

Mr. Stump: I just asked him if he discussed it with them. I didn't ask him what he said.

The Court: I think that the available supply of sand and gravel is rather immaterial.

Mr. Stump: Well, your Honor, as far as the discovery itself is concerned seeing it in the river bed is adequate for a discovery or seeing it on a bank. I mean, your discovery in a mineral location, your Honor, doesn't answer all the questions as to whether or not you have discovered it, and——

The Court: Well, but how would the extent or quantity of sand and gravel tend to prove or disprove any issue? [195]

Mr. Stump: Well, it would tend to prove that he had prospected, had known that it was available and in rather large quantities from what——

The Court: He doesn't have to prove that there was a large quantity. All he needs to prove is that he prospected and discovered gravel. Now, the exact amount or the fact that there was a large quantity, if that is a fact, or a small quantity would be rather immaterial.

Mr. Stump: Very well. I will withdraw the question.

Q. (By Mr. Stump): Mr. Schaub, at the time

(Testimony of H. F. Schaub.)

you made your location discovery on there, where did you go and what did you do and what did you find?

A. Well, knowing this deposit was there, I followed all up to the creek, put our discovery post approximately fifteen hundred feet, thereabouts, from the bridge so we wouldn't interfere with any road construction if that road was widened, approximately fifteen hundred feet from the bridge on basically the stream bed, but it was only the stream bed at flood stages. We went off to one side where there was an ample deposit showing and we put our discovery location, discovery notice——

Q. When you speak of "we," who is "we"?

A. I had a witness along with me—Mr. Zaruba. I looked at this deposit prior to taking Mr. Zaruba out there to witness the location and to witness the markings on the claim, [196] and I picked up or secured a piece of cedar there, probably four, five or six inches in diameter and attempted to write the notices of the location on there, the discovery, and we stepped out our distances and seen where we wanted to go, and I went into town, seeing there was nothing available outside of going to a lot of work chopping down trees and branches to make our location notices. I called up McGillvray Brothers and told them to cut me up some stakes about four feet long and approximately three inches in diameter; it wasn't necessary to buy new lumber; but to give me some stakes that would be somewhere near those measurements.

(Testimony of H. F. Schaub.)

Q. And are those the stakes that you used in making your location?

A. Those are the stakes which we used and which are still there on our location.

Q. Well, now, at this place of discovery was the stream bed there wider from the floods in there than was being used by the water in it at that time? A. Yes, sir, considerably.

Q. Considerably wider? A. Yes.

Q. And was that stream bed composed of sand and gravel?

A. Approximately the whole length of the claim.

Q. And at the point where you made your discovery, after you [197] put up this location or discovery post, and then when did you stake out the corners?

A. We put this one post up about two days before we completed our staking. We had to go through the woods there and take our measurements to the various posts and brush out our lines, and that is what we completed, and I put in my other stakes after finding an ample deposit there at my discovery, which is very clearly defined; I put up this rough stake, and then I asked the contractor, McGillvray Brothers, to make me some new stakes, at which time we went out with a tape and measured off our distance with a tape and compass. That time we went back, we put in a little cut post which was cut by McGillvray Brothers in place of the other post, which was very hard on the original post to read, and put it right alongside

(Testimony of H. F. Schaub.)

of it. I don't know if that post is still there or not. I imagine it is.

Q. And did you file a location notice?

A. At that time, why, upon completing our boundary lines and our four corner stakes and attaching our notice to the claim, which I believe was the 21st of June when we completed it, constituted our location.

Q. I will ask you to tell me what this is?

A. That is a notice for location of a placer claim.

Q. And who made it? A. I made it. [198]

Q. And is this the same one you made and filed and recorded in this case?

A. This is a duplicate copy, and the original copy is filed in the Recorder's Office.

Q. Is this the original copy?

A. That is the original copy.

Mr. Stump: I would like to introduce this as Defendant's Exhibit No. 1.

The Court: It may be admitted and marked Defendant's Exhibit A.

DEFENDANT'S EXHIBIT A

Notice of Location of Placer Claim

Notice is hereby given that the undersigned, having complied with all the requirements of the law and with local customs and regulations, has located and claimed 20 acres of placer mining ground.

This claim shall be known as the Whipple Creek

(Testimony of H. F. Schaub.)

No. 1 placer claim. The point of discovery whereon this notice is situated is: Approximately 1500 feet upstream from bridge in stream channel on the left hand side looking upstream which is discovery post No. 1 and from thence the boundaries of said claim are marked and described as follows:

Commencing at the discovery post and running thence SE 450 feet to Post #2; thence SW 1300 feet to Post #3; thence NW 600 feet to Post #4; thence NE 1300 feet to Post #5; thence SE 150 feet to Post #1.

This claim is located in the Ketchikan Mining District, Territory of Alaska, and situated about 9 miles north of Ketchikan on the North Tongass Highway.

Discovered June 21, 1951.

Located June 21, 1951.

/s/ H. F. SCHAUB,
Locator.

Witnessed:

/s/ C. A. ZARUBA,

/s/ W. C. STUMP.

Received in evidence January 28, 1952.

Q. (By Mr. Stump): Mr. Schaub, is Whipple Creek—can you see it from driving along the regular road there? A. Oh, yes.

(Testimony of H. F. Schaub.)

Q. And what is the bed of the stream composed of? A. Sand and gravel.

Q. It is visible to the naked eye?

A. Yes. You can look up that stream, oh, about a thousand feet, I would estimate.

Q. And the whole bed is sand and gravel?

A. That is right.

Q. Is it a matter of common knowledge that it has been used for taking sand and gravel in the past? A. That is right.

Mr. Stump: That is all. You may cross-examine.

The Court: I think we will recess at this [199] point.

(Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon the trial proceeded as follows):

Cross-Examination

By Mr. Baskin:

Q. Now, Mr. Schaub, in 1940, when you went up to see that land, how far could you see up that creek from the bridge?

A. Oh, back in 1940, that is a long ways back.

Q. How far from the bridge could you see up into that area?

A. Well, I wouldn't attempt to say how far; nothing like you can see up there now.

Q. No, you couldn't, could you? It was all tangled with brush and trees and underbrush?

(Testimony of H. F. Schaub.)

A. That is right.

Q. In fact from the bridge you could only see a short distance up there?

A. Oh, you could see up there——

Q. Two hundred and fifty, three hundred feet?

A. Maybe two hundred, maybe three hundred feet. I have been all through that area many times in the past.

Q. Now, do you have any other claims down there? Have you staked any other claims in the vicinity of Ketchikan?

Mr. Stump: May it please the Court, I will have to object to that unless I understand what the materiality is. [200]

Mr. Baskin: Well, he testified about no other sources available, and we have a right to know whether he has got any other claims; just testing the good faith of this defendant in this case.

The Court: Objection overruled.

Q. (By Mr. Baskin): Have you got any other claims? Have you filed any other mining claims or posted any other mining claims in the vicinity of Ketchikan?

A. No, not in the vicinity of Ketchikan. I have one at Quadra.

Q. You have one at Quadra. Now, where else do you have a claim? A. Do I have a claim?

Q. Yes.

A. I have a claim at Wards Cove Lake now.

Q. All right. Where else do you have one?

A. That is the only claim I have, sir.

(Testimony of H. F. Schaub.)

Q. And have you got one in Martin Arm? Is that Boca de Quadra?

A. That is Boca de Quadra claim.

Q. And any other place? Ward Lake, have you got a claim there?

A. I just mentioned that.

Q. And you had that claim here during the summer too, didn't you? When did you stake that claim? A. Which claim is that?

Q. At Ward Lake.

A. We staked that claim, I believe, in August of last year. [201]

Q. And at the same time that you had a barricade on the Whipple Creek claim you had a barricade on the Ward Lake claim, too, didn't you?

A. Yes. We put the barricade on the Ward Cove Lake the latter part of August, September, thereabouts.

Q. And isn't it a fact that the Government has removed gravel from that Ward Lake pit over a period of years? A. Ward Lake pit?

Q. Yes. A. No.

Q. Well, there is a gravel pit there, isn't there? Isn't there some kind of a gravel pit at Ward Lake?

A. Yes; there is a pit there where the past contractors removed some material out of it.

Q. Well, he was a contractor for the Government, wasn't he? A. That is right.

Q. All right. And isn't it a fact that you and Zaruba posted a claim on the Herring Bay pit that was being used by a Government contractor?

A. No, sir.

(Testimony of H. F. Schaub.)

Q. Didn't Zaruba post one there?

Mr. Stump: I object, may it please the Court.

A. No, sir.

Mr. Stump: Just a minute, until I make my objection. I don't see what materiality this has, where a third party [202] posted some claims.

The Court: Unless you can show that they were engaged in a common enterprise, why, it would be irrelevant of course.

Q. (By Mr. Baskin): Aren't you and Zaruba partners in a business of sand and gravel?

A. No. We have been very close together and been in several businesses in years gone by.

Q. All right. What kind of business has it been?

A. Oh, real estate, buying and selling of boats.

Q. Well, you are familiar with the Herring Bay pit that the contractor for the Government has removed gravel in connection with the road construction down there in the south of Ketchikan, aren't you?

Mr. Stump: Well, I will renew the objection, may it please the Court.

The Court: This apparently is a preliminary question. I don't know what the next one is going to be. It is plainly preliminary.

Q. (By Mr. Baskin): Well, did you put a "No Trespass" sign up at the Herring Bay pit?

A. I didn't.

Q. Did you have somebody do it for you?

A. No. I didn't locate Herring Bay pit.

(Testimony of H. F. Schaub.)

Q. But you know that Zaruba claims that pit, don't you? [203]

A. No; Mr. Zaruba is not the locator of Herring Cove pit.

Q. But he claims to be the owner of it, doesn't he? A. He is the owner of it now, I believe.

Q. And he had somebody else to stake it for him, didn't he? A. Yes.

Mr. Stump: May it please the Court, I am going to object to all this questioning.

The Court: Yes; unless you should ask the witness first whether he is interested in that particular claim out there before asking these questions.

Q. (By Mr. Baskin): Well, are you interested in that Herring Bay pit?

A. No, sir. I have no interest in the Herring Bay pit.

Q. Do you have a partner, or anybody that is in a business enterprise with you, interested in it?

A. No, sir.

Q. Now, then, you stated that the Boca, that you have a claim at Boca de Quadra?

A. That is right, sir.

Q. Is that on Martin Arm?

A. Martin Arm.

Q. And isn't there a big barge that is broken up right in front of that pit where you obtain gravel there? A. No, sir.

Q. Isn't there a big barge that is stationed right at the —— [204]

A. There is a big barge in there; that is true. It

(Testimony of H. F. Schaub.)

used to belong to the Government. They broke it when they brought materials up there several years ago, but it doesn't interfere with the operation of my pit.

Q. I don't contend that. I am just trying to identify that. I have been down there. I just wanted to know if that is the right one.

A. That is right.

Q. And isn't that sand and gravel in the side of a bank alongside that river?

A. Sand; glacial deposit.

Q. Light colored, white sand that is there?

A. That is right.

Q. Didn't you say that made the blocks too dark, much darker than sand?

A. No, sir; I didn't. I said the sands coming out of my present pit that I am now operating in the City of Ketchikan makes very poor blocks.

Q. What about Boca de Quadra; would it make good block?

A. It would make a beautiful block.

Q. How long have you lived in Ketchikan?

A. Well, permanent residence there about 1939. I headquartered in Ketchikan from about 1937.

Q. You stated that it was common knowledge that this Whipple Creek gravel pit was used as a gravel pit, didn't you? [205]

A. Well, I would like to answer that in this way.

Q. Well, I am asking you to state what you stated a while ago. Didn't you say that it was com-

(Testimony of H. F. Schaub.)

mon knowledge that it had been used as a gravel pit? And you knew that, too?

A. That is right; it was used as a gravel supply.

Q. All right. Call it supply or pit, whatever you wish. You also knew that, didn't you?

A. Yes, sir.

Q. And didn't you in conversation with Mr. McCann, who testified a while ago, during September, August and September, of 1950 learn that the Government was going to construct a highway north of Ketchikan and was going to use this Whipple Creek gravel pit as a source of supply?

A. Well, I don't remember if it was definitely decided whether they were going to use gravel out of Whipple Creek for the source of supply.

Q. But you did have a conversation or several conversations with Mr. McCann during August and September of 1950 regarding the construction of the road, didn't you?

A. That is true, very true.

Q. And you know they were building a bridge during about that time, don't you?

A. Yes; they were constructing a bridge at Wards Cove.

Q. And didn't he tell you on one or several occasions that the Government was going to construct the highway and that [206] they were going to use gravel from the Whipple Creek gravel pit?

A. No, I won't say that. We knew they were going to construct a highway.

Q. Well, do you deny that he told you that they

(Testimony of H. F. Schaub.)

were going to use gravel out of the Whipple Creek gravel pit for use in constructing the road?

A. I will say it was general knowledge that it was going to come out of Whipple Creek.

Q. All right. And you knew it, too, didn't you?

A. Probably. I don't say it was definitely coming out of the gravel pit.

Q. But you knew that they were going to obtain gravel from Whipple Creek in constructing the road, didn't you?

A. I imagine a portion of it would come out of there; yes.

Q. And you knew that back in 1950, during August and September of 1950?

A. I don't know about the time.

Q. Well, during the latter part of 1950?

A. I imagine it was around that time; yes.

Q. All right. You wouldn't deny that it was during the latter part of 1950 that you knew that, would you?

A. It must have been the latter part of 1950 or early part of '51 while the construction was on by Reed and Martin.

Q. Very well. Now, how far out is Whipple Creek from Ketchikan, [207] about how far?

A. I believe it is nine miles.

Q. Isn't it in fact closer to ten or eleven?

A. I won't argue the point. Approximately nine miles from the city limits.

Q. Well, if it is shown to be, that is, if actually

(Testimony of H. F. Schaub.)

there is a milepost of about twelve miles there, you wouldn't dispute that, would you?

A. Well, if the milepost says twelve miles, it must be twelve miles. Now, is that from the center of Ketchikan?

Q. Well, I think that is the fact, Mr. Schaub. Now, what is the distance of Ward Lake pit from Ketchikan?

A. Four and a half, oh, six, seven miles, probably eight. I live at four-and-a-half mile and I think it is probably twice the distance.

Q. And you have a claim on that pit, do you not? A. Yes.

Q. You and Zaruba?

A. No, not me and Zaruba.

Q. Well, didn't Zaruba have a claim on there, and then you went on and staked it?

A. Zaruba had a claim on there which was filed approximately in August, and we found that we would probably interfere with the camp stoves and camp sites, and so we relocated, Mr. Zaruba and I, we relocated the claim. [208]

Q. All right. And then didn't he come back and relocate his claim again?

A. I believe he has.

Q. So, you have actually staked that Ward Lake pit three times. He staked it once, and then you and Zaruba staked it, and then he staked it again; isn't that right? A. That is right.

Q. And that pit is six or seven miles from Ketchikan? A. Six or seven.

Mr. Baskin: No further examination.

(Testimony of H. F. Schaub.)

Redirect Examination

By Mr. Stump:

Q. Mr. Schaub, you do own the claim at Boca de Quadra that has the good sand that you spoke of? A. That is right.

Q. Why don't you use it in making blocks now?

A. The cost of getting it into town is prohibitive.

Q. I see. When was the first time, Mr. Schaub, that you had positive proof that the Bureau of Public Roads were going to use Whipple Creek?

Mr. Baskin: Well, I object to that, your Honor. He stated he had knowledge of it in the latter part of 1950.

Mr. Stump: He didn't say that he—he said he heard talk about it; he had no definite [209] knowledge.

The Court: Well, he may explain his answer of course if he wishes to.

A. I didn't know it was definite until I seen the bids.

Q. (By Mr. Stump): The specifications?

A. The specifications.

Q. Did you ever have a talk with a superintendent of any contractor that was bidding on it and did he state how he would get his material?

A. That is right. I had a talk with Mr. Ray Ravelle, who was superintendent for Morrison-Knudsen.

Q. Who bid on the job?

(Testimony of H. F. Schaub.)

A. Who bid on the job; and he told me, if he was successful, he would——

Mr. Baskin: Well, I object——

A. ——prepare to quarry it.

Mr. Baskin: Wait just a minute. I object to him stating hearsay testimony, may it please the Court.

The Court: Yes. The objection is sustained.

Mr. Davidson: Your Honor, it is not hearsay. It is a matter of knowledge. He is not testifying as to the truth of the statement but what he was told as to his knowledge. He is not testifying that Morrison-Knudsen would use rock pressure. He is testifying that the best of his knowledge was that they would use rock pressure.

The Court: Well, that is rather debatable. If that [210] is the purpose of it, of course it would be admissible, but from the way the question was asked and answered it looked like——

Mr. Stump: Well, I will reframe the question.

Q. (By Mr. Stump): Did you know how one of the bidders who bid on the job contemplated getting their aggregate for their surfacing?

A. I did.

Q. And how were they going to get it?

Mr. Baskin: Well, I object——

A. Crush it out of the quarry.

Mr. Baskin: ——it is hearsay, may it please the Court.

The Court: Yes. It is just the very point that I made here. It now becomes hearsay.

(Testimony of H. F. Schaub.)

Mr. Davidson: Your Honor, the point he asked is, did he know they were going to use rock pressure?

The Court: Yes; but that isn't the question nor answer. That is the trouble. You have made a sound objection if it were addressed to evidence of that kind, but it isn't. It is a matter of—he wants to prove when he acquired knowledge. Of course he can prove it by something of that kind, and then of course the inquiry is not as to the truth of what was said but to the fact that he obtained notice there.

Mr. Davidson: That is right.

The Court: But that isn't what his answer [211] was.

Mr. Stump: Very well. I will ask the question.

Q. (By Mr. Stump): Did you know how Morrison-Knudsen, Incorporated, one of the contractors who bid on the job, how they were going to secure their surfacing if they were successful?

A. I did.

Q. How were they going to secure it?

Mr. Baskin: Well, just a minute. I object to that.

The Court: We are right back to where we started from. That is plain hearsay. Objection sustained.

Mr. Baskin: And besides, Morrison-Knudsen is not shown to have obtained, even bid, or at least had a bid accepted for construction work in this present project or any other project.

(Testimony of H. F. Schaub.)

The Court: Of course we don't have to quibble much over the admissibility of anything here where there is no jury. The Court over objection will not consider hearsay, but without objection he will consider it.

Mr. Davidson: Your Honor, the question is, did you have knowledge of any other way to get sand and gravel, and can be answered, I think.

The Court: That isn't what he was asked. The question called for a hearsay answer and elicited a hearsay answer.

Mr. Stump: Well, let me ask this.

Q. (By Mr. Stump): Were there other methods of securing the aggregate in the Ketchikan area other than from the Whipple [212] Creek pit?

Mr. Baskin: I object to that, may it please the Court. If there were, then why shouldn't he go out and get it at some other place other than Whipple Creek, but that isn't material. He testified here a while ago that there were no other sources of material, and now he is testifying that there are, and counsel is either impeaching his witness or he is bringing in matters of fact that are irrelevant and immaterial and which he has been told.

The Court: Well, you are not going to object to his impeaching his own witness, are you?

Mr. Baskin: Well, he seems like he is trying to.

Q. (By Mr. Stump): In the production of aggregate, Mr. Schaub, is it necessary to have much sand for road surfacing?

A. Not for road surfacing.

(Testimony of H. F. Schaub.)

Q. And in the road surfacing is it possible to operate a quarry and secure your material?

A. Well, normal procedure, which I think the engineer will bear with me, that they could make a superior product by crushing, crushing rock, especially for the surfacing material that is required on the road job rather than out of a pit with sand deposits.

Q. And in the operation of your business is it essential that you have a percentage of sand for making building blocks of concrete? [213]

A. Yes, sir; I have to have sand.

Q. About what percentage?

A. Well, I would say it should run forty per cent sand and sixty per cent aggregates; forty per cent fine aggregates, which is sand; sixty per cent coarse aggregates, which is gravel.

Q. Well, did you know of any other way in which to secure the aggregate to fulfill this present Manson-Osberg contract?

Mr. Baskin: Well, your Honor, now, he is asking a question as to where a contractor, who is not even a party to this suit, could get the material.

The Court: Yes. The question as to what somebody else could do is immaterial.

Q. (By Mr. Stump): Mr. Schaub, after your claim was staked, did the Government or the Forest Service tell you they were going to not let you have that claim at Whipple Creek?

A. That is right.

Q. Did you make the other staking referred to

(Testimony of H. F. Schaub.)

at Wards Cove, was that after the Government had told you they were going to kick you out of Whipple Creek? A. That is right.

Mr. Stump: That is all.

Recross-Examination

By Mr. Baskin:

Q. Mr. Schaub, the Government has never acknowledged your [214] claim there, have they? They have always denied it; isn't that right?

A. That is right.

Mr. Baskin: No further examination.

Mr. Stump: That is all, Mr. Schaub. Defendant rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Baskin: Just one moment. No, we have no rebuttal.

The Court: Well, I would prefer to have counsel submit briefs on the evidence and the law. How much time do you want?

Mr. Baskin: May the Government have at least ten days, your Honor? We have been so busy here.

The Court: You may have two weeks. How much time does the defense want for an answering brief?

Mr. Davidson: Two weeks.

The Court: Two weeks. And ten days for a reply if you feel a reply brief is necessary.

Mr. Baskin: Thank you.

(End of record.) [215]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., The United States of America vs. H. F. Schaub, No. 3174-KA of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 215, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 5th day of January, 1953.

/s/ MILDRED K. MAYNARD,
Reporter.

[Endorsed]: Filed January 5, 1953. [216]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Ketchikan, Alaska, this 9th day of January, 1953.

[Seal] J. W. LEIVERS,
Clerk of District Court.

By /s/ A. V. SIMONSEN,
Deputy Clerk.

[Endorsed]: No. 13685. United States Court of Appeals for the Ninth Circuit. H. F. Schaub, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed January 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 13685

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT H. F. SCHAUB'S STATEMENT OF POINTS ON APPEAL

I. The judgment in favor of the United States of America was in error for the following reasons:

1. Correction Memorandum No. 11 was not in the form of nor in purpose a special use permit under 48 U.S.C.A. §341 (62 Stat. 100) withdrawing the land covered thereby from mineral entry, nor was it issued by authorized officials under that statute, nor was it an appropriation of the land covered thereby authorized by or validly executed under 23 U.S.C.A. §18 (42 Stat. 216).

2. The order of the Secretary of the Interior withdrawing the land from mineral entry effective on July 26, 1951, did not relate back to prior administrative acts of the Regional Forester on February 9, 1951, so as to invalidate defendant's otherwise valid mineral entry on June 21, 1951.

3. No part of the premises embraced in defendant's mineral location was in actual use by or possession of plaintiff at the time of entry.

4. The United States District Court erred in excluding from evidence a certain letter dated February 7, 1951, by Frank Heintzleman to the Chief, U. S. Forest Service, Washington, D. C.; United States Department of Agriculture, Forest Service, Circular No. U-220, dated December 16, 1949; and Regulations U-1, U-2 and U-3, U. S. Forest Service Manual, pp. NF-G3 (1) to NF-G3 (5).

II. The United States District Court was in error in denying defendant's motion for a new trial and this court should order a new trial:

1. For the reasons specified in paragraph I hereof; and because

2. The United States District Court erred in denying defendant's motion for transmittal of copies of exhibits offered and refused as part of the record on appeal.

/s/ W. H. FERGUSON,

/s/ DONALD McL. DAVIDSON,

/s/ WILFRED C. STUMP,
Attorneys for Defendant.

Affidavit of mailing attached.

[Endorsed]: Filed January 19, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes Now appellant, H. F. Schaub, and designates the following portion of the record which is material to the consideration of the appeal:

The complete record of all of the proceedings in the above action heretofore filed in the office of the United States Court of Appeals for the Ninth Circuit, including the following:

Stenographic Transcript of Testimony at the trial; Complaint; Correction Memorandum No. 11; Answer; Defendant's Interrogatories; Plaintiff's Answers to Defendant's Interrogatories 1-17; Pre-Trial Orders; Plaintiff's Exhibit No. 1; Plaintiff's Exhibit No. 2; Defendant's Exhibit A; Opinion of Lyle Watts; Opinion of the District Court (Judge Folta); Motion for a New Trial; Findings of Fact and Conclusions of Law; Judgment; Bond for Costs; Notice of Appeal; Motion for Order Directing Transmittal of Exhibits Offered and Refused as Part of Record on Appeal; Affidavit in Support of Defendant's Motion for Transmittal of Copies of Exhibits Offered and Refused as Part of the Record on Appeal; Minute Orders.

/s/ W. H. FERGUSON,

/s/ DONALD McL. DAVIDSON,

/s/ WILFRED C. STUMP,

Attorneys for Appellant.

Affidavit of mailing attached.

[Endorsed]: Filed January 19, 1953.